

**ADVANCE SHEETS**

OF

**CASES**

ARGUED AND DETERMINED IN THE

**COURT OF APPEALS**

OF

**NORTH CAROLINA**

*MARCH 27, 2020*

**MAILING ADDRESS: The Judicial Department  
P. O. Box 2170, Raleigh, N. C. 27602-2170**

**THE COURT OF APPEALS  
OF  
NORTH CAROLINA**

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#### APPEAL AND ERROR

**Interlocutory order—condemnation action—substantial right—statutory rights of landowners**—The trial court's order allowing the city of Charlotte to amend its complaint, deposit, and declaration of taking in a condemnation proceeding, while interlocutory, was immediately appealable where it implicated a substantial right of the landowner. Without appellate review, the order had the effect of forcing the landowner to proceed to trial despite its right under N.C.G.S. § 136-105 to accept the deposit as full compensation and bring the litigation to an end. Condemnation cases put the parties in an unusual posture, since the defendant landowner's right to claim compensation put that party in a position comparable to that of a plaintiff in other

## APPEAL AND ERROR—Continued

types of civil cases; here, the denial of the landowner's attempt to take a voluntary dismissal and assert its statutory rights affected a substantial right. **City of Charlotte v. Univ. Fin. Props., LLC, 135.**

**Preservation of issues—constitutional argument—untimely request—**Defendant's petition for writ of certiorari was denied and his request for appellate review dismissed regarding whether the trial court erred by ordering defendant to submit to lifetime satellite-based monitoring before making a reasonableness determination where defendant failed to raise the issue before the trial court and failed to argue specific facts demonstrating manifest injustice. **State v. Gentle, 269.**

**Preservation of issues—prior order vacated in prior appeal—new order appealed—**Where a father challenged the trial court's failure to consider his child's grandmother as placement for out-of-home care, the Court of Appeals rejected an argument that he waived review of the issue by not raising it in his prior appeal. In that prior appeal, the Court of Appeals vacated the prior order of the lower court, so the father could raise any argument on appeal from the new order. **In re D.S., 194.**

## ATTORNEY FEES

**Criminal contempt—civil judgment for attorney fees—notice and opportunity to be heard—**The trial court erred in entering judgment against defendant for attorney fees after finding him in criminal contempt where defendant was on notice but not given the opportunity to be heard as required by N.C.G.S. § 7A-455(b). **State v. Baker, 237.**

**Custody modification—timeliness of objection—waiver—**In a proceeding to modify child custody, the mother waived her objection to the father's request for attorney fees where she waited until the third day of the hearing to object when the father submitted a supplemental affidavit in support of his initial request. **Kolczak v. Johnson, 208.**

## CHILD ABUSE, DEPENDENCY, AND NEGLECT

**Guardianship—grandparents—standing to appeal—**A child's grandparents had standing to appeal the trial court's orders adjudicating the child neglected and terminating the grandparents' guardianship even though the Department of Social Services (DSS) argued that a prior order granting them guardianship was deficient as a matter of law. DSS could not avoid review of this petition based on a non-jurisdictional error in the prior guardianship order from a previous neglect petition. Further, even assuming the prior guardianship order was void, an earlier order had granted custody to the grandparents, so they were parties with a right to appeal. **In re M.N., 203.**

**Neglect—adjudication—impairment or substantial risk—findings—**The trial court properly adjudicated a child as neglected where the child had been in stable voluntary placement outside of her parents' home for an extended period of time when the mother stated her intent to take the child from placement and move her out of state. Even though the trial court failed to make an ultimate finding that the child suffered an impairment or was at substantial risk of impairment as the result of her mother's actions, the evidence supported such a finding, as the trial court found that the father was incarcerated and the mother had issues related to substance abuse, mental health, unstable housing, and prostitution. **In re C.C., 182.**

## CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

**Neglect—harm or substantial risk of harm—sufficiency of finding**—The trial court erred, as conceded by the parties, in an adjudication of juvenile neglect by failing to make any findings showing harm or creation of a substantial risk of such harm, and the Court of Appeals reversed and remanded the issue where no evidence introduced at adjudication supported such findings. **In re M.N., 203.**

## CHILD CUSTODY AND SUPPORT

**Modification—substantial change in circumstances—implicit conclusion of law**—Even though the trial court did not explicitly state its conclusion that a substantial change of circumstances affecting the welfare of the children occurred which would justify modifying child custody, the court's extensive findings of fact detailing negative changes in the family since the entry of the initial consent order, including but not limited to those resulting from the mother's remarriage to a man with a criminal history, were sufficient to support an order of modification. The findings and the trial court's conclusion that the father was entitled to a modification of custody made clear that the basis for modification was a substantial change in circumstances. **Kolczak v. Johnson, 208.**

## CIVIL PROCEDURE

**Voluntary dismissal—condemnation action—defendant's right to file—effect of dismissal**—Due to the special nature of condemnation proceedings where the right to just compensation vests in the landowner, a defendant landowner had the right to file a voluntary dismissal pursuant to Rule 41(a). Since a voluntary dismissal ends any pending claim, in this case the landowner's claim for determination of just compensation, the dismissal here served as an admission pursuant to N.C.G.S. § 136-107 that the amount deposited constituted just compensation for the taking. The dismissal also removed any authority from the trial court to enter any further orders in the case, including on plaintiff's pending motion to amend the deposit, other than the entry of judgment in the amount deposited. **City of Charlotte v. Univ. Fin. Props., LLC, 135.**

## CONSTITUTIONAL LAW

**Confrontation Clause—statements by confidential informant—nonhearsay**—The admission of statements made by a confidential informant to law enforcement at defendant's trial for trafficking cocaine did not violate defendant's Sixth Amendment right to confront witnesses against him where the statements were non-hearsay evidence offered not to prove the truth of the matter asserted but to explain how and why the investigation against defendant began. Further, the trial court gave a limiting instruction to the jury before accepting the testimony to ensure the statements would be properly considered for the purpose for which they were admitted. **State v. Steele, 315.**

**Confrontation Clause—stipulation and waiver—admission of forensic laboratory report**—The trial court was not required to conduct a colloquy with defendant before allowing him, through counsel, to stipulate to the admission of multiple forensic laboratory reports identifying substances as cocaine, even though such stipulation acted as a waiver of defendant's constitutional rights, including the right to cross-examine witnesses. **State v. Perez, 311.**

## CONSTITUTIONAL LAW—Continued

**Invocation of right to counsel—ambiguous**—The trial court properly denied defendant's motion to suppress statements made to police during a custodial interview after he invoked his right to counsel where defendant explicitly asked if he could consult with a lawyer. His invocation of his right to counsel was ambiguous considering the totality of the circumstances; moreover, he immediately initiated further communication with law enforcement. **State v. Nobles, 289.**

**Right to counsel—forfeiture—obstructive conduct**—The trial court was not required to conduct an inquiry regarding waiver of counsel in a criminal proceeding pursuant to N.C.G.S. § 15A-1242 where defendant did not waive his right to counsel by seeking to represent himself, but forfeited his right to counsel by refusing to cooperate with more than one appointed counsel, constantly interrupting the trial court as it tried to explain defendant's right to counsel, continuing to be argumentative after being given an opportunity to discuss forfeiture with his lawyer outside of the courtroom, and obstructing court by refusing to hand discovery to his lawyer to submit to the trial court. **State v. Forte, 245.**

## CONTEMPT

**Civil contempt—findings of fact—temporary parenting agreement**—Sufficient competent evidence was presented to support the trial court's findings of fact that a mother willfully violated communication and visitation provisions of a temporary parenting agreement. It is within the trial court's purview to weigh the evidence, determine credibility, and make findings based upon the evidence; the court also properly exercised its discretion in determining the mother's actions were willful. **Kolczak v. Johnson, 208.**

**Civil contempt—purge conditions—inclusion necessary**—A civil contempt order entered after a mother was found to have violated a temporary parenting agreement was deficient for failing to provide any method for how the mother could purge the contempt. **Kolczak v. Johnson, 208.**

**Criminal contempt—hearsay—corroborative evidence**—Two transcripts of testimony and statements by a trial witness were properly admitted in a contempt hearing for corroborative purposes and to explain the context of the proceeding in which the defendant made a gun gesture with his hand from his position in the courtroom audience to the witness who was then testifying in a trial against defendant's cousin. **State v. Baker, 237.**

**Criminal contempt—willfulness**—The trial court's findings that defendant made a gun gesture with his hand while looking directly at the witness testifying on the stand and that the conduct was intended to interrupt the testimony of the witness was supported by sufficient evidence, and in turn supported the conclusion that defendant's conduct was willful as required by the contempt statute. **State v. Baker, 237.**

## CONTRACTS

**Real property—right of first refusal to purchase—preemptive right—lack of recordation—actual notice**—The trial court did not err in ordering defendants to convey commercial real property to the plaintiff, who had signed an agreement giving him the right of first refusal to buy the property in the event the owners decided to sell. Unlike option contracts, a right of first refusal is a preemptive right that does

## CONTRACTS—Continued

not have to be recorded in order to be valid, and even if it had been recorded, defendants could not claim to be innocent purchasers for value where they had actual notice of the existence of the right and of plaintiff's interest in exercising that right. **Anderson v. Walker, 129.**

## CRIMES, OTHER

**Crime against nature—committed in a public place—sufficiency of evidence**—In a prosecution for crime against nature, evidence that the offense occurred near the bottom of the stairs in a parking lot was sufficient to support the theory of the crime being committed in a “public place,” despite other evidence describing the location as being “dark and wooded,” since there is no requirement that the sexual acts giving rise to the crime occur in public view. **State v. Gentle, 269.**

## CRIMINAL LAW

**Jury instruction—defenses—defense of habitation**—The trial court erred in a prosecution for first-degree murder by denying defendant's request for a jury instruction on defense of habitation where the victim continued to return to defendant's property and threaten him with bodily harm despite numerous requests to leave and multiple orders from law enforcement, and it was not disputed that the victim was within the curtilage of defendant's property. There was prejudice because a person who uses permissible force is immune from civil or criminal liability. **State v. Kuhns, 281.**

**Motion for appropriate relief—dismissed without prejudice**—Defendant's motion for appropriate relief based on alleged constitutional violations was dismissed without prejudice to refile in superior court where the materials before the appellate court were not sufficient to make a determination. **State v. Nobles, 289.**

## DIVORCE

**Venue—removal of action—necessary findings**—The trial court's order transferring the parties' alimony proceeding to another county did not contain sufficient findings pursuant to N.C.G.S. § 50-3 regarding whether defendant resided outside of the presiding county at the time plaintiff filed her alimony action. The Court of Appeals rejected plaintiff's argument that section 50-3 did not apply unless there was some pending motion or trial date to be transferred after reviewing the plain language of the statute, which only required the existence of an ongoing alimony proceeding. **Scheinert v. Scheinert, 234.**

## DRUGS

**Trafficking cocaine by possession—constructive possession—sufficiency of evidence**—In a trial for trafficking cocaine by possession, sufficient evidence was presented from which the jury could infer that defendant had constructive possession of cocaine found at a residence. Among other things, defendant shared a bedroom in which drug paraphernalia and illegal contraband were found, and defendant made a statement to another arrestee showing his knowledge about the weight of cocaine found in the bedroom. **State v. Steele, 315.**

## EMINENT DOMAIN

**Temporary easement—beach restoration—applicability of public trust rights**—In a condemnation action by a coastal town seeking a ten-year easement to private property in order to carry out a beach restoration project, the trial court erred in entering judgment notwithstanding the verdict (JNOV) in favor of the town eight months after final judgment, since it based its decision on grounds that were not raised at directed verdict or JNOV. The trial court's determination that the town already possessed easement rights through the public trust doctrine and that the taking was therefore non-compensable was improper where the issue was not previously raised by the town in accordance with the Rules of Civil Procedure or the condemnation statutes. **Town of Nags Head v. Richardson, 325.**

**Temporary easement—beach restoration—compensation—sufficiency of evidence**—Landowners presented sufficient evidence through the expert opinion of an appraiser to support the jury's conclusion that the temporary easement taken by a town for a beach restoration project was compensable in the amount of \$60,000.00, representing the fair market value of the easement. **Town of Nags Head v. Richardson, 325.**

**Temporary easement—beach restoration—expert testimony—compensable value**—The trial court abused its discretion in admitting the expert testimony of an appraiser in an action by a town taking a ten-year easement to private property to carry out a beach restoration project where the appraiser did not provide the method used to derive the value of the easement. **Town of Nags Head v. Richardson, 325.**

## EVIDENCE

**Admissibility—statements by confidential informant**—The admission of statements made by a confidential informant to law enforcement at defendant's trial for trafficking cocaine was not unfairly prejudicial where the statements were relevant and explained the steps law enforcement took during its investigation, and the trial court gave the jury a limiting instruction on how the statements could be considered. **State v. Steele, 315.**

**Hearsay—custody modification—criminal activity—prejudice**—In a hearing to modify custody, evidence of criminal activity by the mother's husband gleaned from online sources and newspaper articles was not prejudicial, even if it constituted impermissible hearsay, given the extensive other similar evidence that was properly before the trial court. **Kolczak v. Johnson, 208.**

**Medical—hypothetical—speculative**—The Industrial Commission did not err in a workers' compensation case by characterizing a doctor's opinion as speculative where plaintiff claimed a neck and a back injury but this doctor only treated plaintiff for her neck and had no knowledge of her back condition prior to the workplace accident. Although the doctor's opinion on plaintiff's low back symptoms was based on a hypothetical, his testimony demonstrated that his opinion of causation was based exclusively on a temporal relationship. **Garrett v. Goodyear Tire & Rubber Co., 155.**

## GUARDIAN AND WARD

**Placement with non-relative—consideration of relatives—lack of findings or conclusions**—Where a father challenged the trial court's failure to consider his child's grandmother as a placement for out-of-home care, the Court of Appeals

## **GUARDIAN AND WARD—Continued**

rejected an argument by Youth and Family Services that the record contained sufficient facts for the Court of Appeals to determine that the trial court properly considered placement with the grandmother but concluded it was not in the child's best interest. The trial court made no findings or conclusions resolving this statutorily required question, and resolving the factual issue was beyond the scope of appellate review. **In re D.S., 194.**

**Placement with non-relative—parent's standing to appeal—**A father had standing to challenge the trial court's failure to consider his child's grandmother as a placement for out-of-home care because the father was asserting his own interest in having the court consider a relative before granting guardianship to a non-relative. **In re D.S., 194.**

## **INDICTMENT AND INFORMATION**

**Fatal variance—misdemeanor larceny—evidence at trial—**No fatal variance existed between the indictment charging defendant with larceny of a checkbook from a named individual and the evidence at trial showing that the checkbook belonged to that individual's auto salvage shop, where ample evidence indicated the victim had exclusive possession and control of the checkbook since he was the actual owner of the shop, he testified that the checkbook was his, his name was written on it, and it contained stubs of checks he had written. **State v. Forte, 245.**

**Fatally defective—habitual felon status—essential elements—date of offense and corresponding date of conviction—**An indictment for habitual felon status was fatally defective because it alleged an offense date for a different crime than the one for which defendant was convicted in violation of N.C.G.S. § 14-7.3. **State v. Forte, 245.**

## **JUDGMENTS**

**Clerical error—remanded—**A clerical error in an order arresting judgment in an action involving several offenses resulted in the matter being remanded for the correction of the order to accurately reflect the offense for which judgment was arrested. **State v. Nobles, 289.**

## **JURISDICTION**

**Mootness—subsequent order—question not considered by trial court—**A subsequent guardianship order ceasing all visitation and contact between a child and her grandmother did not render moot a father's argument that the trial court erred by failing to consider the grandmother as placement for out-of-home care before granting guardianship to a non-relative. Even though the facts relied upon to cease the grandmother's visitation may have been relevant to the issue of guardianship, the question of whether the grandmother should have been given priority placement had not been considered by the trial court. **In re D.S., 194.**

**Subject matter—standing—right to assert claim—claim conveyed in settlement agreement—**In a case involving indebted business entities, the trial court properly granted defendants' motion to dismiss plaintiff indebted business owner's obstruction of justice claim for lack of subject matter jurisdiction. Plaintiff had transferred all of his assets, including any potential claims and causes of action, to the receiver as part of his settlement agreement and release, so, even assuming

## JURISDICTION—Continued

plaintiff had a colorable claim for obstruction of justice, that claim was conveyed to the receiver and thus plaintiff did not have a sufficient stake in the claim to establish standing. **McDaniel v. Saintsing, 229.**

## LARCENY

**Multiple counts—single transaction—entry of one judgment—**Seven of eight counts of larceny were vacated where all the property was stolen in a single transaction, constituting a single larceny. **State v. Forte, 245.**

## NATIVE AMERICANS

**Cherokee—status as Indian—criminal jurisdiction—**Qualification as an Indian under the federal Indian Major Crimes Act is an issue of first impression in North Carolina and the Fourth Circuit. Federal Courts of Appeal use a two-pronged test under *United States v. Rogers*, 45 U.S. 567 (1846). Neither party disputed that the first prong of *Rogers* was satisfied in this case because defendant had sufficient Indian blood. **State v. Nobles, 289.**

**Findings—jurisdiction—status as Indian—**The trial court's findings and conclusions concerning a criminal defendant's status as a Cherokee were supported by sufficient evidence and the sufficiency of other findings were not addressed. Erroneous or irrelevant findings that did not affect the trial court's conclusions were not grounds for reversal. **State v. Nobles, 289.**

**Jurisdiction—Cherokee—determination of status—recognition by tribe—**For criminal jurisdiction purposes, the determination of whether a person is a member of the Eastern Band of Cherokee Indians involves a two-pronged test under *United States v. Rogers*, 45 U.S. 567 (1846). There is a split in federal circuits on assessing the second prong—recognized as an Indian by a tribe or the federal government. Defendant would not qualify as an Indian under either test and the trial court did not err by denying his motion to dismiss a state court prosecution. **State v. Nobles, 289.**

**Jurisdiction—first descendants of enrolled tribal members—**A prior decision of the Eastern Band of Cherokee Indians to exercise its criminal tribal jurisdiction over first descendants of enrolled members implicated only one factor that may be used to satisfy the second prong of *United States v. Rogers*, 45 U.S. 567 (1846), for determining who is an Indian under the federal Indian Major Crimes Act. While it indicates a degree of tribal recognition, which is relevant, the *Rogers* test contemplates a balancing of multiple factors to determine Indian status. **State v. Nobles, 289.**

**Jurisdiction—Qualla Boundary—non-Cherokee defendant—**The federal Indian Major Crimes Act normally preempts state criminal jurisdiction when an Indian (using the statutory term) commits an enumerated major crime in the Qualla Boundary of the Eastern Band of Cherokee Indians. **State v. Nobles, 289.**

**Jurisdiction—state criminal—Indian status—no special instruction—**The trial court did not err by denying defendant's motion for a special instruction on the issue of his Indian status as it related to criminal jurisdiction. Defendant failed to adduce sufficient evidence to create a jury question on the issue. **State v. Nobles, 289.**

**Jurisdiction—status as Indian—receipt of assistance—**The trial court properly determined that a criminal defendant who claimed to be Cherokee did not satisfy the

## **NATIVE AMERICANS—Continued**

factor of receipt of assistance available only to members of a federally recognized tribe. Defendant received free health care services on five occasions when he was a minor, with the last instance approximately 22 years before his arrest. **State v. Nobles, 289.**

**Jurisdiction—status as Indian—socially recognized affiliation with tribe—**The trial court properly determined that a criminal defendant's social and cultural connection with the Eastern Band of Cherokee Indians had little weight in determining his status as a Cherokee for purposes of criminal jurisdiction. **State v. Nobles, 289.**

**Jurisdiction—test for Indian status—**The trial court properly determined that defendant did not satisfy the first prong of *St. Cloud v. United States*, 702 F. Supp. 1456 (1988), for determining Indian status. Defendant was not an enrolled member of the Eastern Band of Cherokee Indians but claimed First Descendant status; however, that status carried little weight because defendant was not classified as a First Descendant even though there was evidence that he would qualify for the designation. **State v. Nobles, 289.**

**Status as Indian—benefits of tribal affiliation—First Descendant status—**The trial court did not err by determining that a criminal defendant's evidence did not satisfy the factor for determining Indian status that he had received the benefits of affiliation with a federally recognized tribe. To the degree that defendant may have benefited from his First Descendant status and received free medical care when he was a minor 23 years earlier, it was irrelevant in light of the evidence that he never enjoyed any other tribal benefits based on his First Descendant status. **State v. Nobles, 289.**

## **RAPE**

**Jury instruction—serious personal injury—mental or emotional harm—**In a trial for rape, sexual offense, kidnapping, and crime against nature, the trial court did not commit plain error by instructing the jury it could find that the victim suffered a "serious personal injury" based on a mental injury which would elevate the first two offenses to the first degree, since the State presented sufficient evidence from which the jury could find a serious personal injury based on the physical injuries defendant inflicted on the victim. **State v. Gentle, 269.**

## **TERMINATION OF PARENTAL RIGHTS**

**No-merit brief—no issues on appeal—independent review—**Where respondent-mother's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the mother did not file a pro se brief, the Court of Appeals dismissed the appeal without conducting an independent review of the record for issues not raised on appeal, as Rule 3.1(d) did not explicitly grant indigent parents the right to that review. **In re L.V., 201.**

## **WORKERS' COMPENSATION**

**Disability—conclusions—**The Industrial Commission did not err in a workers' compensation case in its conclusions that plaintiff was only entitled to temporary disability. The weight of the evidence was for the Commission to determine, the Commission's methods were not "too mechanical" as argued by plaintiff, and its

## **WORKERS' COMPENSATION—Continued**

unchallenged facts supported the conclusion of an offer of suitable employment despite plaintiff's fear of another injury. **Garrett v. Goodyear Tire & Rubber Co., 155.**

**Evidence—stipulations—Commission to determine weight—**In a workers' compensation case, it was for the Full Industrial Commission to determine the weight to be given to the medical records of two doctors. Although the records were stipulated, nothing would have prohibited sworn opinions from the doctors. **Garrett v. Goodyear Tire & Rubber Co., 155.**

**Issue preservation—failure of Full Commission to consider argument—**The Industrial Commission erred in a worker's compensation case by not considering plaintiff's argument that defendants were estopped from denying the compensability of her claims. Defendants maintained that the issue of whether they were estopped was not before the Full Commission because plaintiff did not appeal the deputy commissioner's opinion and award. However, there were no findings or conclusions in the deputy commissioner's opinion and award addressing the issue and there was nothing to appeal. Plaintiff was deprived of her right to have her case fully and finally determined. **Garrett v. Goodyear Tire & Rubber Co., 155.**

**Low back condition—causation—**The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff failed to prove that her low back condition was caused by a workplace accident. The Full Commission's opinion and award included several findings that referred to plaintiff's stipulated medical records and therefore she was unable to show that the Full Commission did not consider those records. **Garrett v. Goodyear Tire & Rubber Co., 155.**

**Neck injury—compensable injury medical evidence—**Medical testimony in a workers' compensation action supported the conclusion that the aggravation of plaintiff's pre-existing neck condition was caused by a workplace accident where the doctor treated plaintiff's neck injury before and after the workplace accident and testified that the accident aggravated the existing neck condition. The temporal sequence of events was not the only factor he considered and the opinion was based on more than mere speculation. **Garrett v. Goodyear Tire & Rubber Co., 155.**

**Temporary disability—determination—**The Industrial Commission erred in awarding temporary total disability compensation in a workers' compensation action by not making sufficient findings regarding the effect that plaintiff's compensable neck injury had on her ability to earn wages during a particular period. The evidence before the Commission did not show that plaintiff was incapable of working at any employment during the relevant period. **Garrett v. Goodyear Tire & Rubber Co., 155.**

**SCHEDULE FOR HEARING APPEALS DURING 2020**  
**NORTH CAROLINA COURT OF APPEALS**

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20<sup>th</sup> Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25<sup>th</sup> Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7<sup>th</sup> Holiday) and 21

October 5 and 19

November 2, 16 and 30



**ANDERSON v. WALKER**

[260 N.C. App. 129 (2018)]

DAVID ANDERSON, PLAINTIFF

v.

CHRISTOPHER DAVID WALKER, GEORGE TSIROS AND CURTIS T, LLC,  
A NORTH CAROLINA LIMITED LIABILITY COMPANY, DEFENDANTS

No. COA17-782

Filed 3 July 2018

**Contracts—real property—right of first refusal to purchase—  
preemptive right—lack of recordation—actual notice**

The trial court did not err in ordering defendants to convey commercial real property to the plaintiff, who had signed an agreement giving him the right of first refusal to buy the property in the event the owners decided to sell. Unlike option contracts, a right of first refusal is a preemptive right that does not have to be recorded in order to be valid, and even if it had been recorded, defendants could not claim to be innocent purchasers for value where they had actual notice of the existence of the right and of plaintiff's interest in exercising that right.

Appeal by defendants from judgment entered 9 January 2017 by Judge Sharon Tracey Barrett in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2018.

*Dungan, Kilbourne & Stahl, P.A., by Robert C. Carpenter,  
for plaintiff-appellee.*

*Matney & Associates, P.A., by David E. Matney, III, and  
Sonya N. Rikhye, for defendant-appellants George Tsiros and  
Curtis T, LLC.*

*No brief filed on behalf of defendant-appellee Christopher  
David Walker.*

CALABRIA, Judge.

George Tsiros ("Tsiros") and Curtis T, LLC (collectively, "defendants") appeal from the trial court's judgment ordering Christopher David Walker ("Walker") to convey certain commercial real property to David Anderson ("plaintiff"). After careful review, we affirm.

**ANDERSON v. WALKER**

[260 N.C. App. 129 (2018)]

**I. Factual and Procedural Background**

On 7 March 2014, plaintiff filed the instant complaint and *lis pendens* in Buncombe County Superior Court. Plaintiff alleged that, in December 2010, he entered into an agreement with Walker to lease a piece of real estate at 1022 Haywood Road in Asheville (“the property”), to operate plaintiff’s business. In January 2013, plaintiff and Walker executed a new lease that included a notarized right of first refusal in plaintiff’s benefit (“the ROFR Agreement”). Subsequently, Curtis T, LLC, through its member and manager Tsiros, entered into an agreement (“the Option Agreement” or “Memorandum of Option”) to purchase the property from Walker. In his complaint, plaintiff sought specific performance and a declaratory judgment of the rights of the parties. Specifically, plaintiff sought to exercise his interest in the property pursuant to the ROFR Agreement, and to have defendants’ Memorandum of Option declared null and void.

On 9 May 2014, defendants filed a responsive pleading, which included an answer, multiple motions to dismiss, a motion for judgment on the pleadings, and a crossclaim requiring Walker to tender the property, or alternatively to pay liquidated damages. On 21 May 2014, the Clerk of Superior Court of Buncombe County entered a default against Walker, with regard to plaintiff’s complaint, for failure to plead or appear.

On 31 October 2014, the trial court entered an order denying plaintiff’s motion for summary judgment, denying defendants’ motion for judgment on the pleadings, and granting in part defendants’ motions to dismiss. Specifically, the trial court granted in part and denied in part the motions to dismiss, “in that Plaintiff’s claim to have the Memorandum of Option declared null and void is dismissed and no other claims of Plaintiff are dismissed.”

On 27 October 2016, the Clerk of Superior Court of Buncombe County entered a default against Walker, with regard to defendants’ crossclaim, for failure to plead or appear. On 9 January 2017, the trial court entered its judgment in this matter. The court noted the defaults entered against Walker with respect to both plaintiff’s complaint and defendants’ crossclaim. The court found that although plaintiff and Walker had executed a notarized right of first refusal with respect to the property in 2013, the document was never recorded. The court also found that when defendants executed agreements to purchase the property, Walker gave Tsiros a copy of plaintiff’s lease, and that the ROFR Agreement specifically referenced in the lease had not yet expired. In addition, in 2014, defendants met with plaintiff, who informed them of his intent to exercise his right of first refusal.

**ANDERSON v. WALKER**

[260 N.C. App. 129 (2018)]

The court further found that in January of 2014, defendants executed agreements to purchase the property, which were recorded. The court found that it was only after plaintiff became aware of defendants' Option Agreement that he gave formal notice of his intent to exercise the right of first refusal. However, the court found that "it would be unjust and inequitable to enforce the Option Agreement procured by [defendants] so as to deprive Plaintiff of" his right of first refusal, and that defendants, inasmuch as they relied upon equity, failed to comport with the maxim, "he who comes into equity must come with clean hands."

The trial court therefore determined that defendants' conduct in securing the option contract was "overreaching and oppressive[.]" that plaintiff's right of first refusal took precedence, and that defendants maintained a claim against Walker for breach of contract. The court ordered Walker to convey the property to plaintiff by a general warranty deed pursuant to the right of first refusal, with the same terms and conditions, and concluded that defendants had no rights in the property. The court further ordered Walker to pay damages to defendants for breach of contract, payable from the proceeds of the sale of the property to plaintiff.

Defendants appeal.

**II. Right of First Refusal**

In two separate arguments, defendants contend on appeal that the trial court erred in specifically enforcing an unrecorded right of first refusal in favor of plaintiff. We disagree.

**A. Standard of Review**

"The sole function of the equitable remedy of specific performance is to compel a party to do that which in good conscience he ought to do without court compulsion. The remedy rests in the sound discretion of the trial court, and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Munchak Corp. v. Caldwell*, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980) (citations omitted), *modified on other grounds*, 301 N.C. 689, 273 S.E.2d 281 (1981).

**B. Analysis**

It is well established that "a binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced." *Hutchins v. Honeycutt*, 286 N.C. 314, 318, 210 S.E.2d 254, 256-57 (1974) (citations and quotation marks omitted). Specific performance "is granted or withheld according to the equities

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that flow from a just consideration of all the facts and circumstances of the particular case.” *Id.* at 319, 210 S.E.2d at 257.

A right of first refusal, also known as a “preemptive right,” “requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person.” *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610 (1980) (citation and quotation marks omitted). Although analogous to option contracts, preemptive provisions “are technically distinguishable.” *Id.* Whereas “[a]n option creates in its holder the power to compel sale of land, . . . [a] preemptive provision, on the other hand, creates in its holder only the right to buy land before other parties if the seller decides to convey it.” *Id.* at 61, 269 S.E.2d at 610-11 (citations omitted). “Preemptive provisions may be contained in leases, in contracts, or . . . in restrictive covenants contained in deeds or recorded in chains of title.” *Id.* at 61, 269 S.E.2d at 611 (citations omitted).

A right of first refusal is enforceable against a subsequent purchaser for value who has “actual or constructive knowledge of the preemptive right.” *Legacy Vulcan Corp. v. Garren*, 222 N.C. App. 445, 449, 731 S.E.2d 223, 226 (2011). Generally, a person is

charged with notice of what appears in the deeds or muniments in his grantor’s chain of title, including . . . instruments to which a conveyance refers. . . . Under this rule, the purchaser is charged with notice not only of the existence and legal effects of the instruments, but also of every description, recital, reference, and reservation therein. . . . If the facts disclosed in a deed in the chain of title are sufficient to put the purchaser on inquiry, he will be charged with notice of what a proper inquiry would have disclosed.

*Id.* at 449, 731 S.E.2d at 226-27 (citation and quotation marks omitted).

However, “[a]n innocent purchaser takes title free of equities of which he had no actual or constructive notice.” *Id.* at 449, 731 S.E.2d at 227 (citation and quotation marks omitted). Accordingly,

[w]here the defense of “innocent purchaser” is interposed and there has been a bona fide purchase for a valuable consideration, the matter which debases the apparent fee must have been expressly or by reference set out in the muniments of record title or brought to the notice of the purchaser *in such a manner as to put him upon inquiry*.

*Id.* (citation and quotation marks omitted).

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[260 N.C. App. 129 (2018)]

In the instant case, plaintiff and Walker executed the ROFR Agreement on 29 January 2013. Plaintiff paid Walker \$2,000.00 in consideration for a two-year preemptive right to the property. This ROFR Agreement was incorporated by reference in a new, 1.5-year lease. The agreement was effective until 31 December 2014, barring a mutual written agreement or an offer to purchase between plaintiff and Walker. Nonetheless, on 18 December 2013, Walker signed an Offer to Purchase and Sale Memorandum with Tsiros, without giving plaintiff any written notice. At that time, Walker provided Tsiros with a copy of the lease and the ROFR Agreement that was specifically referenced in the lease. On 10 January 2014, defendants informed plaintiff that Walker had contracted to sell the property to Tsiros.

On appeal, defendants contend that Curtis T, LLC's right to purchase the property was superior to plaintiff's, because unlike the Option Agreement, neither the lease nor the ROFR Agreement were ever recorded. We disagree.

Our recordation statute, N.C. Gen. Stat. § 47-18, provides, in pertinent part:

No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies[.] . . . [I]nstruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration[.]

N.C. Gen. Stat. § 47-18(a) (2017). Therefore, according to the plain language of the statute, a right of first refusal need not be recorded in order to be valid.

Furthermore, “[o]ur registration statute does not protect all purchasers, but only innocent purchasers for value.” *Hill v. Pinelawn Mem’l Park, Inc.*, 304 N.C. 159, 165, 282 S.E.2d 779, 783 (1981). “While actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status.” *Id.* Where a purchaser claims protection under our registration laws, he has the burden of proving by a preponderance of the evidence that he is an innocent purchaser for value, i.e., that he paid valuable consideration and

## ANDERSON v. WALKER

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had no actual notice, or constructive notice by reason of *lis pendens*, of pending litigation affecting title to the property.

According to the terms of the ROFR Agreement, if Walker wanted to transfer his interest in the property within two years of the date of the agreement, he was to give plaintiff at least ninety days' notice before the date of the proposed transfer. Later, plaintiff agreed to only sixty days to exercise his right of first refusal. Defendants were aware that plaintiff was interested in exercising his right of first refusal, because all three parties signed a document acknowledging the sixty-day notice requirement. Despite this knowledge, defendants subsequently signed and recorded the Option Agreement.

The trial court found that, after discovering the existence of the Option Agreement in the Buncombe County Register of Deeds, plaintiff "made arrangements as quickly as possible to secure the funding he would need to purchase the Property. Plaintiff gave formal notice of his intent to purchase the Property under the ROFR by way of the Complaint[.]" Plaintiff secured a lender to loan him the money and was ready, willing and able to purchase the Property on 7 March 2014, which was within the sixty-day period. That day, immediately after filing the complaint, plaintiff also filed a *lis pendens* upon the property, asserting a right to enforce his preemptive right. On 9 May 2014, defendant Curtis T, LLC gave notice of its intent to exercise its purchase rights under the Option Agreement by letter to defendant Walker. It is clear, therefore, that defendant Curtis T, LLC only exercised its rights after the filing of plaintiff's complaint and *lis pendens*, at which point all parties had knowledge of plaintiff's rights under the ROFR Agreement. Therefore, defendants had actual notice.

Moreover, the trial court found that defendant Tsiros was personally aware of plaintiff's right of first refusal as early as 18 December 2013. The trial court found that Tsiros had multiple meetings with Walker and plaintiff; that "[a]ll present knew that Plaintiff was interested in exercising the ROFR"; and that plaintiff had explicitly informed Tsiros "that [plaintiff] was working to line up investors to allow him to exercise his rights under the ROFR." The trial court found that it was only after one such meeting that Tsiros "arranged to have an Option Agreement prepared[.]" despite knowing "that Plaintiff was a tenant in possession who had preemptive rights under the ROFR and that Plaintiff was planning to exercise those rights."

The right of an innocent purchaser for value to take priority over an unrecorded right in real property only applies to those purchasers who

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acquire title without knowledge, actual or constructive, of another's unrecorded rights. Here, defendants knew – whether from personally speaking with plaintiff or from the filing of plaintiff's complaint and *lis pendens* – that plaintiff had rights in the property which he sought to exercise. Therefore, defendants were not innocent purchasers for value. Furthermore, the fact that the ROFR Agreement was not recorded did not protect their subsequent Option Agreement.

We hold therefore that the trial court did not err in ruling that the ROFR Agreement was enforceable, ordering that it be enforced, and concluding that defendants were not entitled to specific performance of the Option Agreement. We affirm the trial court's judgment.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

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THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF  
v.

UNIVERSITY FINANCIAL PROPERTIES, LLC, A NORTH CAROLINA LIMITED LIABILITY  
COMPANY F/K/A UNIVERSITY BANK PROPERTIES LIMITED PARTNERSHIP; BANK OF AMERICA, N.A.  
F/K/A NCNB NATIONAL BANK OF NORTH CAROLINA, TENANT; AND ANY OTHER PARTIES  
IN INTEREST, DEFENDANTS

No. COA17-388

Filed 3 July 2018

**1. Appeal and Error—interlocutory order—condemnation action—substantial right—statutory rights of landowners**

The trial court's order allowing the city of Charlotte to amend its complaint, deposit, and declaration of taking in a condemnation proceeding, while interlocutory, was immediately appealable where it implicated a substantial right of the landowner. Without appellate review, the order had the effect of forcing the landowner to proceed to trial despite its right under N.C.G.S. § 136-105 to accept the deposit as full compensation and bring the litigation to an end. Condemnation cases put the parties in an unusual posture, since the defendant landowner's right to claim compensation put that party in a position comparable to that of a plaintiff in other types of civil cases; here, the denial of the landowner's attempt to take a voluntary dismissal and assert its statutory rights affected a substantial right.

## CITY OF CHARLOTTE v. UNIV. FIN. PROPS., LLC

[260 N.C. App. 135 (2018)]

**2. Civil Procedure—voluntary dismissal—condemnation action—defendant’s right to file—effect of dismissal**

Due to the special nature of condemnation proceedings where the right to just compensation vests in the landowner, a defendant landowner had the right to file a voluntary dismissal pursuant to Rule 41(a). Since a voluntary dismissal ends any pending claim, in this case the landowner’s claim for determination of just compensation, the dismissal here served as an admission pursuant to N.C.G.S. § 136-107 that the amount deposited constituted just compensation for the taking. The dismissal also removed any authority from the trial court to enter any further orders in the case, including on plaintiff’s pending motion to amend the deposit, other than the entry of judgment in the amount deposited.

Appeal by defendant from order entered 29 September 2016 by Judge Daniel A. Kuehnert in Superior Court, Mecklenburg County. Heard in the Court of Appeals 15 November 2017.

*Parker Poe Adams & Bernstein, LLP, by Nicolas E. Tosco, Benjamin R. Sullivan, and Charles C. Meeker, for plaintiff-appellee.*

*Johnston, Allison & Hord, P.A., by Martin L. White, R. Susanne Todd, and David V. Brennan, for defendant-appellant University Financial Properties, LLC.*

STROUD, Judge.

Defendant University Financial Properties, LLC (“defendant”) appeals from the trial court’s order entered 29 September 2016 granting plaintiff’s motion to amend its “Complaint, Declaration of Taking and Notice of Deposit and Service of Plat.” On appeal, defendant argues that the trial court erred by ruling that defendant’s voluntary dismissal had no effect to end the case and in granting plaintiff’s motions to amend its complaint. We reverse the trial court’s order because after defendant filed its notice of voluntary dismissal, the trial court no longer had authority to rule on plaintiff’s motion to amend its complaint, declaration of taking, and deposit. Under N.C. Gen. Stat. §§ 136-105 and 136-107 (2017), defendant was in the position of the claimant and had the right to elect to accept the deposit or to go to trial, and plaintiff had no right to force defendant to proceed to trial after defendant elected to dismiss its claim for determination of just compensation. We reverse and remand for entry of a final judgment in accord with N.C. Gen. Stat. § 136-107, setting compensation based on the deposit.

## CITY OF CHARLOTTE v. UNIV. FIN. PROPS., LLC

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Facts

Plaintiff filed its complaint, declaration of taking, notice of deposit, and service of plat in April 2013. Plaintiff estimated the sum of \$570,425.00 to be just compensation for the taking. Plaintiff deposited that sum with the superior court and stated that defendant could “apply to the Court for disbursement of the money as full compensation, or as a credit against just compensation, to be determined in this action.” Defendant applied for disbursement of the deposit on 22 July 2013. An order granting the disbursement request was entered the next day, 23 July 2013.

Defendant filed its answer on 9 April 2014, requesting a jury trial to determine just compensation for the taking. On 24 October 2014, plaintiff filed a motion for determination of issues other than damages under N.C. Gen. Stat. § 136-108 (2017), asking the trial court to determine what impact, if any, construction of a bridge on an existing public right-of-way may have in this action and whether the interference with the view of the property is a compensable taking. On or about 19 November 2014, plaintiff filed a motion for partial summary judgment, arguing that plaintiff was “entitled to partial summary judgment on the question of whether an elevated bridge that the City plans to build at the intersection of North Tryon Street and W.T. Harris Boulevard is part of the taking in this case and is an element of the just compensation owed to [defendant] University Financial.” Plaintiff argued that construction of the bridge was not part of the taking but rather was part of the construction of a public project on existing public property, so defendant should not be entitled to compensation for any impacts from the bridge. On 17 December 2014, the trial court denied all of plaintiff’s motions and concluded that defendant was entitled to present evidence at trial of the bridge’s impact on defendant’s remaining property.

On 5 April 2016, this Court reversed the trial court, holding that the loss of visibility due to the bridge is not a compensable taking and remanded the case for further proceedings consistent with its opinion. *City of City of Charlotte v. Financial Properties*, \_\_ N.C. App. \_\_, \_\_, 784 S.E.2d 587, 594 (2016), *disc. review denied*, 369 N.C. 37, 792 S.E.2d 789 (2016).

Plaintiff then filed a motion to amend its complaint on 22 August 2016, asking that the complaint be amended to state the lesser sum of \$174,475.00 as its estimate of just compensation for the taking. Plaintiff asserted that it is entitled to a jury trial on the amount of compensation and under N.C. Gen. Stat. § 136-121 (2017) to a refund from defendant

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“to the extent that Plaintiff’s previous deposit exceeds the amount of just compensation determined by the final judgment in this action.” Plaintiff filed a second motion to amend its complaint on 25 August 2016 after the North Carolina Supreme Court declined to review this Court’s earlier opinion.

On 1 September 2016, defendant filed a notice of voluntary dismissal without prejudice under Rule 41(a) of the North Carolina Rules of Civil Procedure. A corrected notice of voluntary dismissal without prejudice was filed one day later, 2 September 2016, to correct a clerical error regarding the file number. The notice stated:

Defendant, University Financial Properties, LLC, through the undersigned counsel, pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure hereby gives notice of voluntary dismissal without prejudice of all pending claims against Plaintiff, including claims for additional compensation and attorney’s fees, said Defendant accepting the amount of deposit in the above-entitled action. Each party shall bear its own costs and attorneys’ fees.

In addition, on 6 September 2016, defendant filed a motion for judgment on the pleadings, alleging that defendant “is entitled to final judgment as a matter of law against Plaintiff in the amount deposited.”

On 29 September 2016, the trial court entered an order granting plaintiff’s motions to amend its complaint, declaration of taking, and notice of deposit and service of plat. The trial court made findings of fact regarding the procedural history of the case, generally as described above, and then addressed the pending motions as follows:

9. On August 22, 2016, the City filed a Motion to Amend Its Complaint in order to decrease the Complaint’s estimate of just compensation to One Hundred Seventy-Four Thousand Four Hundred Seventy-Five Dollars (\$174,475.00). This decrease would remove from the Complaint’s estimate of just compensation any compensation for the bridge to be built within North Tryon Street, which the Court of Appeals has held is not a part of this condemnation.

10. The North Carolina Court of Appeals later issued an Order formally certifying to this Court that University Financial’s Petition for Discretionary Review had been

**CITY OF CHARLOTTE v. UNIV. FIN. PROPS., LLC**

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denied. That Order was received by this Court on August 25, 2016. Later that day, the City filed with this Court its Second Motion to Amend its Complaint, which was identical to its first Motion to Amend its Complaint.

11. On September 1, 2016, University Financial filed a “Notice of Voluntary Dismissal Without Prejudice,” which purported to dismiss, under North Carolina Rule of Civil Procedure 41(a), the demand for additional compensation in University Financial’s Answer.

12. On September 6, 2016, University Financial filed a Motion for Judgment on the Pleadings requesting that this Court enter final judgment awarding University Financial compensation of \$570,425.00, the estimated just compensation in the City’s un-amended Complaint.

13. This action has not been scheduled for trial, nor have any other deadlines been set in this case. As a result, granting the City’s request to amend its Complaint would not delay or disrupt any proceeding already scheduled in this action.

14. Good cause exists to allow the City to amend its Complaint as requested by the City’s two motions to amend.

Based on these findings, the Court concludes as follows:

1. University Financial’s “Notice of Voluntary Dismissal Without Prejudice” was not a proper or valid dismissal under North Carolina Rule of Civil Procedure 41. The voluntary dismissal was a nullity and did not have the effect of concluding this case by acknowledging satisfaction with the amount of the deposit and waiving further proceedings to determine just compensation as contended by University Financial. To conclude otherwise would be to fail to follow the Court of Appeals’ mandate in this case.

2. University Financial’s voluntary dismissal does not prevent this Court from considering the City’s motions to amend or from allowing the City to amend its Complaint.

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3. The Court is mandated by the Court of Appeals' ruling in this case to allow the City's timely motions to amend and give no impact whatsoever to University Financial's voluntary dismissal.

4. The Court concludes that this Order is a final ruling as to the meaning and effect of University Financial's voluntary dismissal because it has cut off some of University Financial's claim for the full amount of the deposit. *See* N.C. R. Civ. P. 54(b).

5. Given the uniqueness of the facts and applicable law in this case, the Court certifies that there is no just reason to delay an appeal of this matter. A trial would be a waste of the Court's time and resources at this point in time given this Order, and the prior Court of Appeals' mandate. Whereas, if [University] Financial is correct in its interpretation of the effect of its filing a voluntary dismissal, then a trial would be presented in a significantly different manner.

**IT IS THEREFORE ORDERED** as follows:

1. For good cause shown, the City of Charlotte's Motion to Amend its Complaint, Declaration of Taking and Notice of Deposit and Service of Plat and Second Motion to Amend its Complaint, Declaration of Taking and Notice of Deposit and Service of Plat are hereby granted. The City may file an Amended Complaint, Declaration of Taking and Notice of Deposit and Service of Plat within fourteen (14) days after entry of this Order.

2. University Financial may file an answer or otherwise plead in response to the Amended Complaint, Declaration of Taking and Notice of Deposit and Service of Plat within thirty (30) days after being served with that pleading.

3. University Financial's voluntary dismissal had no effect to end this case and does not limit University Financial's ability to answer or otherwise plead in response to the Amended Complaint or its ability to seek compensation beyond that estimated in the Amended Complaint.

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4. At the hearing, University Financial withdrew its Motion for Judgment on the Pleadings, and consequently the Court is not ruling on that Motion.

5. Pursuant to North Carolina Rule of Civil Procedure 54(b), this matter is certified for immediate appeal as there is no just reason for delay.

6. Pursuant to the provisions of N.C. Gen. Stat. § 1-270, *et. seq.*, and N.C. Rule of Appellate Procedure 8(a), all further proceedings in this action shall be stayed upon University Financial's filing of a Notice of Appeal until further order of this Court. The Clerk is directed to enter this Stay on the docket.

Defendant timely appealed to this Court.

Discussion

## I. Interlocutory Order

[1] The order on appeal is not a final resolution of all issues as to all parties, so it is an interlocutory order. *See, e.g., Wilfong v. North Carolina Dept. of Transp.*, 194 N.C. App. 816, 817, 670 S.E.2d 331, 332 (2009) (“An order is either interlocutory or the final determination of the rights of the parties. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. Defendant appeals from an interlocutory order entered following a hearing under N.C. Gen. Stat. § 136-108 (2007). Because G.S. 136-108 hearings do not finally resolve all issues, an appeal from a trial court's order rendered in such hearings is interlocutory.” (Citations and quotation marks omitted)). As this Court explained previously:

It is well established that interlocutory orders, which are made during the pendency of an action, are generally not immediately appealable. If, however, the order implicates a substantial right that will be lost absent our review prior to the entry of a final judgment, an immediate appeal is permissible.

In condemnation proceedings, our appellate courts have identified certain “vital preliminary issues,” such as the trial court's determination of the title or area taken, which affect a substantial right and are subject to immediate appeal. In its order pursuant to N.C. Gen. Stat.

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§ 136-108, the trial court concluded that the City's construction of the Bridge was "part of the taking in this action." Because this ruling concerns the area encompassed by the taking, we have jurisdiction over the City's appeal with regard to the trial court's determination of this issue.

*City of Charlotte v. Univ. Fin. Properties, LLC*, \_\_ N.C. App. \_\_, \_\_, 784 S.E.2d 587, 590 ("University Financial I"), review dismissed, 369 N.C. 37, 792 S.E.2d 518 (2016), and disc. review denied, 369 N.C. 37, 792 S.E.2d 789 (2016) (citations and quotation marks omitted).

In this appeal, defendant argues that it has a substantial right which would be lost without an immediate appeal of the trial court's order, because the order "deprives [defendant] University of its ability to end the litigation short of trial for the initial deposit in which it has a vested right." Defendant contends that N.C. Gen. Stat. § 136-105 (2017) gives the landowner a right to accept the deposit as full compensation and the condemnor has no right to force a landowner to submit its claim to a jury trial. In addition, defendant argues that plaintiff has no right to decrease its deposit under N.C. Gen. Stat. § 136-103 (2017), so trial court's order deprived it of the protection of this statute as well.

Plaintiff argues that defendant has not shown a substantial right which would entitle it to an interlocutory appeal because avoiding a trial is not a substantial right and motions to amend under Rule 15(a) of the North Carolina Rules of Civil Procedure should be freely granted in the trial court's discretion. Plaintiff's arguments are based on generally correct statements of law but ignore the substantive and procedural rights set forth in North Carolina General Statutes Chapter 136, Article 9 regarding condemnation cases. We must view this issue in the context of those procedures and rights.

We addressed the extent of the compensable taking in *University Financial I*, \_\_ N.C. App. \_\_, 784 S.E.2d 587, and on remand, the trial court entered the order on appeal, which does not resolve the case but would require defendant to proceed to a jury trial on just compensation. In *University Financial I*, plaintiff was required to appeal from the trial court's order immediately or it would have lost the right to challenge the extent of the compensable taking in an appeal after a final judgment. *Id.* at \_\_, 784 S.E.2d at 590.

This appeal presents issues similar to those in an order addressing the title or area taken, because it raises an issue other than determining just compensation, but it is not one of the issues which must be appealed

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immediately. In eminent domain cases, interlocutory orders concerning title or area taken must be appealed immediately or the right to appeal is lost. *See, e.g., Stanford v. Paris*, 364 N.C. 306, 312, 698 S.E.2d 37, 41 (2010) (“This Court has said that in condemnation cases, after a hearing pursuant to N.C.G.S. § 136-108, appeal of an issue affecting title to land or area taken by the State is mandatory and the interlocutory appeal must be taken immediately.”).

Plaintiff argues that the *only* issues in a condemnation action which affect a substantial right and are immediately appealable are issues relating to ownership of land or what parcel is being taken, quoting from *N.C. Dep’t of Transp. v. Stagecoach Village*, 166 N.C. App. 272, 601 S.E.2d 279 (2004), *vacated sub nom.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005), as follows: “[T]hese are the only two condemnation issues affecting substantial rights[.]” *Id.* at 274, 601 S.E.2d at 280. Plaintiff conveniently omits the remainder of the quoted sentence: “from which immediate appeal *must* be taken.” *Stagecoach Village*, 166 N.C. App. at 274, 601 S.E.2d at 280 (emphasis added). In addition, the quote is taken from the Court of Appeals’ opinion in *Stagecoach Village*, which was vacated by the North Carolina Supreme Court for erroneously concluding that the underlying order did not concern title to the property being condemned. 360 N.C. at 48, 619 S.E.2d at 497. It is true that these particular issues – ownership and parcel taken – must be appealed immediately or any potential challenge to the interlocutory order is lost; they cannot be raised on appeal after the final judgment. *See Highway Commission v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967) (“One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land the State Highway Commission is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors.”). But this does not mean that these are the *only* two issues a party to a condemnation case may appeal prior to a final judgment. If a landowner can show impairment of a substantial right which would be lost based on some other issue, an interlocutory appeal can be proper. *See, e.g., SED Holdings, LLC v. 3 Star Properties, LLC*, \_\_ N.C. App. \_\_, \_\_, 791 S.E.2d 914, 919 (2016) (“Immediate review is available where an interlocutory order affects a substantial right that will clearly be lost or irretrievably adversely affected if the order is not reviewed before final judgment. As our Supreme Court has acknowledged, this determination must be made on a case-by-case basis: The substantial right test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by

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considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.” (Citations, quotation marks, and brackets omitted)).

Plaintiff also argues that an order granting a motion to amend a complaint does not affect a substantial right and there is no right of immediate appeal, citing to *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 407, 747 S.E.2d 292, 296 (2013), which addresses the issue as presented in that case with one sentence: “However, we do not have jurisdiction to review the Business Court’s decision granting LendingTree’s motion to amend its complaint since that decision does not affect a substantial right.” As a general rule in other civil proceedings, it is true that an order allowing a motion to amend is not immediately appealable. *See, e.g., Howard v. Ocean Trail Convalescent Center*, 68 N.C. App. 494, 496, 315 S.E.2d 97, 99 (1984) (“The order granting the motion to amend is obviously not a final judgment but is interlocutory. No substantial right is at stake, so there is no right to immediate appeal on this issue.” (Citation and quotation marks omitted)). But the Plaintiff moved to amend not just the complaint but also the deposit and declaration of taking, and we must consider this case in the context of the detailed condemnation statutes which dictate the requirements of the complaint, declaration of taking, deposit, and some procedures – including amendment of the complaint and deposit.

Here, as addressed in more detail below, plaintiff did not have the right to amend the complaint to reduce the deposit, and the trial court’s order granting the amendment and refusing to recognize the effect of the voluntary dismissal has the effect of taking away defendant’s right under N.C. Gen. Stat. § 136-105 to accept the original deposit, thus forcing defendant to choose between accepting the reduced deposit or proceeding with a jury trial. Because of these statutory rights in condemnation cases, granting the motion to amend did affect a substantial right of defendant which would be lost otherwise. Although generally there is no right to an interlocutory appeal to avoid a trial, *see, e.g., Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001) (“[A]voiding the time and expense of trial is not a substantial right justifying immediate appeal.”), the defendant-landowner in a condemnation case does have the right under N.C. Gen. Stat. § 136-105 to avoid a trial by accepting the deposit. *See* N.C. Gen. Stat. § 136-105. Under N.C. Gen. Stat. § 136-107, the landowner’s failure to file an answer within 12 months from service of a complaint is treated as a waiver of the landowner’s right to any further proceeding to determine just compensation. *Id.* Because the claim to compensation is the defendant’s claim, defendant’s

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position is comparable to that of the plaintiff in other types of civil proceedings. And in a typical action, if there is no counterclaim which would prevent the plaintiff from taking a voluntary dismissal, the plaintiff “may take a voluntary dismissal at any time prior to resting his or her case.” *Brandenburg Land Co. v. Champion International Corp.*, 107 N.C. App. 102, 103, 418 S.E.2d 526, 527 (1992).

We also accord deference to the trial court’s certification there is no just reason for delay under Rule 54(b). The trial court certified there was no just reason for delay of this appeal and included in the order detailed findings of fact supporting its determination that an immediate appeal is proper. The trial court concluded:

Given the uniqueness of the facts and applicable law in this case, the Court certifies that there is no just reason to delay an appeal of this matter. A trial would be a waste of the Court’s time and resources at this point in time given this Order, and the prior Court of Appeals’ mandate. Whereas, if [University] Financial is correct in its interpretation of the effect of its filing a voluntary dismissal, then a trial would be presented in a different manner.

“Initially, we note with approval that the trial court’s order sets forth the basis upon which it determined there existed ‘no just reason to delay,’ thus facilitating appellate review.” *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 249, 507 S.E.2d 56, 61 (1998). Although we give great deference to the trial court’s certification, we still must consider the propriety of the trial court’s certification. *See, e.g., Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277, 679 S.E.2d 512, 515 (2009) (“We generally accord great deference to a trial court’s certification that there is no just reason to delay the appeal. However, such certification cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.” (Citations and quotation marks omitted)). We agree with the trial court that this case presents an unusual procedural issue due to the prior appeal and competing filings of both parties on remand. In addition, the underlying claim is the defendant’s claim for just compensation, despite the fact that the plaintiff filed this action.

In condemnation actions, the statutes set forth specific procedures and rights of the parties, and some of these procedures are unique to condemnation cases. Had the trial court ruled in the opposite way and granted defendant’s voluntary dismissal, this matter would have been completely resolved. As the landowner, defendant has a substantial

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right to accept the deposit of just compensation plaintiff made pursuant to N.C. Gen. Stat. § 136-105 and to avoid a jury trial to determine just compensation, and this right will be lost unless we consider defendant's appeal of the trial court's order. Accordingly, we will address the issues raised in this interlocutory order.

## II. Voluntary Dismissal

**[2]** The trial court's order concluded that defendant's voluntary dismissal "had no effect to end this case[.]" Defendant argues that the filing of a notice of voluntary dismissal by a defendant in a condemnation case abandons any claims for a greater recovery and serves as an admission that the deposit tendered is just compensation.

Under Rule 41(a) of the Rules of Civil Procedure, it is well established that if a plaintiff takes a voluntary dismissal of a claim, it strips the trial court of its authority to enter further orders in the case, other than orders taxing costs or attorney fees. *See Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000). A voluntary dismissal leaves the plaintiff exactly where he or she was before the action was commenced. *Id.* A plaintiff may take a voluntary dismissal at any time before he rests the case, even if the defendant has motions pending, as long as there is no counterclaim. *See Carter v. Carter*, 102 N.C. App. 440, 445, 402 S.E.2d 469, 471 (1991) ("If there is no counterclaim pending at the time the plaintiff desires to enter a voluntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1) or if there is a counterclaim and that counterclaim is independent and does not arise out of the same transaction as the complaint, a party may voluntarily dismiss his suit without the opposing party's consent by filing a notice of dismissal." (Citation and quotation marks omitted)).

But in civil proceedings other than condemnation, the plaintiff is the party who brought the claim, not the defendant. Condemnation proceedings differ from other types of cases due to the detailed statutes giving authority to take property for a public purpose:

Article 9 sets forth the procedure for acquiring land by condemnation. These proceedings commence when DOT files a complaint and declaration of taking accompanied by a deposit of the estimated just compensation in the superior court in the county where the land is located. DOT must include in its complaint, *inter alia*, a prayer for determination of just compensation. Upon filing and deposit, title to the land vests in DOT. The right to just compensation vests in the landowner, who may apply to

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the court for disbursement of the deposit, file an answer requesting a determination of just compensation, or both.

The statutes provide that just compensation includes damages for the taking of property rights plus interest on the amount by which the damages exceed DOT's deposit.

*Department of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 5, 637 S.E.2d 885, 889 (2006) (citation omitted).

The condemnor's only "claim" in a condemnation action is to acquire title to the real property. When the condemnor files the condemnation action, notice of taking, and deposit, title to the land immediately vests in the condemnor. N.C. Gen. Stat. § 136-104 (2017). The plaintiff-condemner need not take any other action to accomplish the purpose of its claim, which is to take the land for a public use. *Id.* At this point, only the defendant-landowner has the option of causing the case to become a dispute over the proper amount of just compensation, and the defendant-landowner must file an answer to bring this "claim" for additional compensation. N.C. Gen. Stat. § 136-106 (2017). The defendant in a condemnation proceeding – the property owner – is in the position of the plaintiff in other types of civil claims. The defendant is the only party who has a right to file a claim, by way of the answer, for additional compensation in addition to the deposit. *See id.* At trial, the defendant-landowner, not the plaintiff, must prove that it is entitled to compensation of a particular amount; the amount of the deposit is not admissible evidence of just compensation. *See, e.g., Board of Transportation v. Brown*, 34 N.C. App. 266, 269, 237 S.E.2d 854, 856 (1977) ("The landowner who has a part of his tract taken has the burden of proving by competent evidence this relationship, that is, how the use of the land taken results in damage to the remainder."), *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978).

Chapter 136 does not expressly address the effect of the filing of a voluntary dismissal, but it does recognize the need to reconcile the procedures for condemnation with the Rules of Civil Procedure to accomplish the stated intent to make "the practice in [actions under Chapter 136] . . . conform as near as may be to the practice in other civil actions in said courts." N.C. Gen. Stat. § 136-114 (2017). North Carolina General Statutes Chapter 136, Article 9, sets forth detailed pleading requirements and procedures unique to condemnation actions. The Rules of Civil Procedure apply to condemnation cases, but where Article 9 makes specific provisions for the "mode or manner" of the action, the specific provisions of Article 9 are controlling:

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In all cases of procedure under this Article where the mode or manner of conducting the action is not expressly provided for in this Article or by the statute governing civil procedure or where said civil procedure statutes are inapplicable the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter and the practice in such cases shall conform as near as may be to the practice in other civil actions in said courts.

N.C. Gen. Stat. § 136-114.

We are required to address the effect of a Rule 41(a) dismissal in a way which make the practice in a condemnation case “conform as near as may be to the practice in other civil actions in said courts.” *Id.* Only one published<sup>1</sup> case has addressed the effect of a voluntary dismissal by a defendant-landowner in a condemnation case, and that case is somewhat confusing, since it said that the dismissal had no effect because defendants cannot take voluntary dismissals, but then the Court held that the attempted dismissal had the effect of a voluntary dismissal under Rule 41 and ended the case entirely. *See generally Dept. of Transportation v. Combs*, 71 N.C. App. 372, 322 S.E.2d 602 (1984). In *Combs*, a condemnation case, the defendant filed a voluntary dismissal without prejudice under Rule 41 of the North Carolina Rules of Civil Procedure the morning the matter was set to go to trial, apparently because the defendant was not prepared to proceed. *Id.* at 373-74, 322 S.E.2d at 603. This Court acknowledged the “unusual and novel procedure” of a defendant filing a voluntary dismissal, *id.* at 373, 322 S.E.2d at 603, but concluded:

Our research has failed to disclose any rule, statute, or case which grants a defendant the right to take a voluntary dismissal, whether with or without prejudice, unless the party-defendant taking the dismissal has a pleading which contains a counterclaim, crossclaim, or third party claim. Since the rules contain no provision which would

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1. There is also one unpublished case, *Department of Transp. v. Ashcroft Development, LLC*, \_\_ N.C. App. \_\_, 788 S.E.2d 684 (2016) (COA 15-1080) (unpublished), which addresses a voluntary dismissal by a defendant in a condemnation proceeding. While, under Rule 30 of the Rules of Appellate Procedure, “[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority[.]” N.C. R. App. P. Rule 30(e)(3), we note this decision because it addressed the same issue and came to the same conclusion as we do in this case.

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permit a defendant to take the action done in this case by Attorney Smith, and since ordinarily such action would be held a nullity, we are constrained to hold that the filing of the voluntary dismissal by Attorney Smith constituted an abandonment of the case by the defendants and also constituted an acknowledgment of satisfaction with the amount of the deposit as being full and just compensation for the quantity of property taken for the project[.]”

*Id.* at 375, 322 S.E.2d at 604 (citation and quotation marks omitted) (emphasis added). Thus, although it was not the defendant’s intent in *Combs* for the dismissal to serve as an complete abandonment of his claim and acceptance of the deposit as just compensation, that is the effect the Court gave to the dismissal. *Id.* The *Combs* Court did not refuse to recognize the voluntary dismissal as having any effect; if it had, the claim would not have been concluded and the defendant-landowner could have proceeded to a jury trial after the appeal.

In other types of civil proceedings, a plaintiff would have a right to re-file an action once after taking a voluntary dismissal under Rule 41(a). Because the landowner-defendant who had filed the dismissal was the appellant, challenging the entry of judgment for the amount of the deposit on appeal, the *Combs* Court was essentially holding that the defendant-landowner could not take advantage of this benefit of Rule 41 since the defendant was not the party who filed the action. *Id.* This distinction makes sense in the context of condemnation, since title to the land has already vested in the condemnor-plaintiff, and the defendant-landowner’s dismissal has no effect upon the ownership of the land. The only claim in dispute (once any issues under N.C. Gen. Stat. § 136-108 have been resolved) is just compensation, and only the defendant-landowner can assert that claim, by way of answer. Voluntary dismissal of a claim ends the case. *See Doe v. Duke University*, 118 N.C. App. 406, 408, 455 S.E.2d 470, 471 (1995) (“Once a party voluntarily dismisses her action pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990), it is as if the suit had never been filed, and the dismissal carries down with it previous rulings and orders in the case.” (Citations, quotation marks, and brackets omitted)).

N.C. Gen. Stat. § 136-107 provides:

Failure to answer [12 months from service of complaint] shall constitute an admission that the amount deposited is just compensation and shall be waiver of any further proceeding to determine just compensation;

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in such event the judge *shall enter final judgment in the amount deposited* and order disbursement of the money deposited to the owner.

(Emphasis added). If a voluntary dismissal has the effect of making the case as though a suit was never filed – or in this case, an answer was never filed – then under N.C. Gen. Stat. § 136-107 the dismissal must be treated as an admission by defendant that the amount deposited is just compensation for the taking. *Id.* This result is consistent with the effect the *Combs* Court gave to the defendant-landowner’s dismissal. *See Combs*, 71 N.C. App. at 376, 322 S.E.2d at 605. After the defendant-landowner files a voluntary dismissal, the trial court must “enter final judgment in the amount deposited[.]” N.C. Gen. Stat. § 136-107. The statute specifically requires entry of the judgment in the amount *deposited*— not the amount alleged in the complaint. *See id.*

Plaintiff claims this Court previously determined that defendant “is not entitled to compensation for the loss of visibility from University Financial’s remaining property that would result from the Bridge” and argues that the trial court’s order granting the motion to amend plaintiff’s complaint was simply following the mandate this Court set out in its first opinion. The trial court’s order also concluded this result was dictated by the prior opinion. But this Court’s prior opinion resulted from plaintiff’s request for a hearing under N.C. Gen. Stat. § 136-108 to resolve a specific issue of the extent of the compensable taking. *University Financial I*, \_\_ N.C. App. at \_\_, 784 S.E.2d at 589-90. This Court’s opinion concluded only that the trial court “erred in ruling that University Financial is entitled to present evidence concerning all damages resulting from the impact of the construction of the BLE Project, including construction of the Bridge, on its remaining property during the trial on just compensation.” *Id.* at \_\_, 784 S.E.2d at 594 (quotation marks omitted). We did not consider how plaintiff determined its alleged value or deposit; we addressed only the area or interest taken as required in a hearing under N.C. Gen. Stat. § 136-108. *University Financial I*, \_\_ N.C. App. at \_\_, 784 S.E.2d at 590. And this Court could not anticipate how the parties would proceed on remand, nor could we address any issue which might arise later. After remand, both parties were free to file motions and proceed as they wished; this Court’s ruling did not dictate any particular result in those future proceedings regarding the amount of just compensation.

This analysis reconciles the rights and procedures established under Chapter 136 with the usual effect of voluntary dismissals under Rule 41. If the defendant-landowner is deprived of the option of taking a voluntary dismissal under Rule 41, condemnors would have the ability

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to force a property owner to proceed to a jury trial on just compensation if the landowner has filed an answer with this request. If we were to rule as plaintiff urges, a defendant-landowner would not have the right to take a voluntary dismissal to end the case, even if he is satisfied with the deposit and does not wish to proceed to trial. This is inconsistent with N.C. Gen. Stat. §§ 136-105 and 136-107, since the condemnor does not have a right to a trial on just compensation; that right belongs to the landowner. In deciding whether to accept a deposit, the landowner must consider the costs of a trial, such as appraisal fees, expert witness fees, attorney fees, as well as the potential gain or loss from a trial. The condemnor has already taken the land upon filing of the declaration of taking, and the landowner has a right to the deposit which cannot be lost unless it is required to refund a portion after a final judgment for an amount less than the deposit, under N.C. Gen. Stat. § 136-121 (2017). The property owner may decide whether to accept the deposit amount as just compensation, under N.C. Gen. Stat. § 136-105, and do nothing, or file an answer under N.C. Gen. Stat. § 136-106 and proceed to trial to allow a jury to determine just compensation, or file a voluntary dismissal of the claim for determination of just compensation at any time before resting its case.

The fact that plaintiff filed its motion to amend first does not change the result. It is well-established that if there is no counterclaim, the plaintiff – here the landowner – may take a voluntary dismissal under Rule 41(a) at any time until it rests its case. *See, e.g., Williams v. Poland*, 154 N.C. App. 709, 712, 573 S.E.2d 320, 232 (2002) (“Defendants contend that their assertion of a Rule 12(b)(6) motion constitutes a ground for affirmative relief that prevents plaintiff from entering a voluntary dismissal without prejudice. We disagree. A request for affirmative relief has been defined by this Court as relief for which defendant might maintain an action independently of plaintiff’s claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it. Here, the Rule (12)(b)(6) motion to dismiss by defendants cannot survive independently without the plaintiff’s underlying claim. Therefore, the Rule 12(b)(6) motion to dismiss is not a request for affirmative relief that cancel’s plaintiff’s ability to voluntarily dismiss her case without prejudice.”). We therefore hold that the trial court had no authority to rule on plaintiff’s motion to amend the complaint after defendant filed its voluntary dismissal under Rule 41(a). The voluntary dismissal ended the only pending claim, which was the defendant’s claim for determination of just compensation. The dismissal put defendant in the same position as if it had never filed an answer and instead accepted the deposit as just compensation for the taking.

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We conclude that a defendant does have the right to take a voluntary dismissal of its claim for determination of just compensation, as this result is consistent with the practice under Rule 41(a) and in compliance with N.C. Gen. Stat. §§ 136-105 and 136-107.

But one additional twist in this case is that the plaintiff also moved to amend the deposit. Deposits do not exist in other civil proceedings, so we must consider if Chapter 136 could allow amendment of the deposit despite the filing of the voluntary dismissal.

The statute is quite clear that although a complaint or declaration of taking may be amended, a deposit may only be *increased*, not reduced. N.C. Gen. Stat. § 136-103(d) provides as follows:

(d) The filing of said complaint and said declaration of taking shall be accompanied by the deposit of the sum of money estimated by said Department of Transportation to be just compensation for said taking and upon the filing of said complaint and said declaration of taking and deposit of said sum, summons shall be issued and together with a copy of said complaint and said declaration of taking and notice of the deposit be served upon the person named therein in the manner now provided for the service of process in civil actions. *The Department of Transportation may amend the complaint and declaration of taking and may increase the amount of its deposit with the court at any time while the proceeding is pending, and the owner shall have the same rights of withdrawal of this additional amount as set forth in G.S. 136-105 of this Chapter.*

(Emphasis added).

Although amendment of a complaint is allowed more freely under North Carolina Rules of Civil Procedure 15(a), N.C. Gen. Stat. § 136-103 sets forth specific provisions for amendment in condemnation actions. *See* N.C. R. Civ. P. 15(a); N.C. Gen. Stat. § 136-103. Therefore, we must consider whether plaintiff's motion to decrease the deposit could be allowed under N.C. Gen. Stat. § 136-103, even if the defendant has filed a notice of voluntary dismissal. This is a question of statutory interpretation which we review *de novo*.

Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed *de novo*. The principal goal of statutory construction is

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to accomplish the legislative intent. The best indicia of that intent are the language of the statute, the spirit of the act and what the act seeks to accomplish. The process of construing a statutory provision must begin with an examination of the relevant statutory language. It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. In other words, if the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.

*Wilkie v. City of Boiling Spring Lakes*, \_\_ N.C. \_\_, \_\_, 809 S.E.2d 853, 858 (2018) (citations, quotation marks, ellipses, and brackets omitted).

N.C. Gen. Stat. § 136-103(d) allows the condemnor to do two things: (1) “amend the complaint and declaration of taking;” and (2) “increase the amount of its deposit with the court at any time while the proceeding is pending. . . .” The complaint and the deposit are two different things, and they are treated differently.

The language in the statute is clear – the condemnor may amend its complaint and notice of taking and may increase the deposit, but it may not amend a deposit to *decrease* the amount. We cannot read the word “increase” to mean “change” since a change could include a “decrease.” Increase is the opposite of decrease. We construe the statute using its plain meaning. *See Wilkie*, \_\_ N.C. at \_\_, 809 S.E.2d at 858. And the statute plainly allows the condemnor only to increase its deposit “at any time while the proceeding is pending[.]” *See* N.C. Gen. Stat. § 136-103(d). In addition, the next phrase gives the landowner “the same rights of withdrawal of this additional amount” as it had for the initial deposit. *Id.* The statute contemplates only an increase in the deposit and provides for the landowner to withdraw the *additional* amount. *Id.* There is no provision for a decrease in the deposit while the action is pending. And as discussed above, the action is no longer “pending” after defendant’s filing of a voluntary dismissal under Rule 41(a). Thus, the existence of a deposit does not change the result under Rule 41(a) in this case. Even if we assume that a deposit could be increased after a landowner takes a voluntary dismissal – although we cannot imagine why that would ever happen – the statute does not allow an amendment to decrease the deposit at all, so plaintiff’s motion here to decrease the deposit does not change our analysis of the Rule 41(a) dismissal issue.

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Plaintiff contends that “the General Statutes contemplate that some of the deposit may need to be refunded by the property owner.” Plaintiff cites to N.C. Gen. Stat. § 136-121, which is the only statute on condemnation that addresses a refund of any portion of the deposit by a landowner, but this statute applies only after final judgment has been entered for a sum less than the deposit. *See* N.C. Gen. Stat. § 136-121 (“In the event the amount of the final judgment is less than the amount deposited by the Department of Transportation pursuant to the provisions of this Article, the Department of Transportation shall be entitled to recover the excess of the amount of the deposit over the amount of the final judgment and court costs incident thereto[.]”). This statute does not grant the condemnor the ability to decrease the deposit or to force a landowner to proceed to trial, but entitles it to reimbursement only after entry of final judgment for a lesser amount, normally after a property owner elects to proceed to trial instead of accepting the deposit amount as just compensation and a jury determines an amount of damages for just compensation less than that which was deposited. *Id.*

The amount of the deposit is not competent evidence during a jury trial, so the jury never sees that number in making its determination of just compensation. *See* N.C. Gen. Stat. § 136-109(d) (2017) (“The report of commissioners shall not be competent as evidence upon the trial of the issue of damages in the superior court, nor shall evidence of the deposit by the Department of Transportation into the court be competent upon the trial of the issue of damages.” (Emphasis added)). Chapter 136 of the North Carolina General Statutes specifically requires a trial judge to enter judgment in the amount of the deposit when a condemnation defendant – the landowner – does not file an answer contesting the deposit amount. *See* N.C. Gen. Stat. § 136-107 (“Any person named in and served with a complaint and declaration of taking shall have 12 months from the date of service thereof to file answer. Failure to answer within said time shall constitute an admission that the amount deposited is just compensation and shall be a waiver of any further proceeding to determine just compensation; in such event the judge shall enter final judgment in the amount deposited and order disbursement of the money deposited to the owner.” (Emphasis added)).

Here, defendant’s voluntary dismissal ended the case, and the trial court had no authority to rule on plaintiff’s pending motion to amend. We need not address the trial court’s ruling on the motion to amend any further, since it had no authority to rule on that motion. Once the dispute as to determination of just compensation ended with the dismissal, the trial court must enter final judgment “in the amount deposited. . . .”

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N.C. Gen. Stat. § 136-107. We therefore reverse the trial court's order and remand for entry of a final judgment in accord with N.C. Gen. Stat. § 136-107.

Conclusion

The trial court's order is reversed, and this matter is remanded to the trial court for entry of a final judgment.

REVERSED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

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LISA A. GARRETT, EMPLOYEE, PLAINTIFF

v.

THE GOODYEAR TIRE & RUBBER CO., EMPLOYER, LIBERTY MUTUAL  
INSURANCE CO., CARRIER, DEFENDANTS

No. COA17-500

Filed 3 July 2018

**1. Workers' Compensation—issue preservation—failure of Full Commission to consider argument**

The Industrial Commission erred in a worker's compensation case by not considering plaintiff's argument that defendants were estopped from denying the compensability of her claims. Defendants maintained that the issue of whether they were estopped was not before the Full Commission because plaintiff did not appeal the deputy commissioner's opinion and award. However, there were no findings or conclusions in the deputy commissioner's opinion and award addressing the issue and there was nothing to appeal. Plaintiff was deprived of her right to have her case fully and finally determined.

**2. Workers' Compensation—low back condition—causation**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff failed to prove that her low back condition was caused by a workplace accident. The Full Commission's opinion and award included several findings that referred to plaintiff's stipulated medical records and therefore she was unable to show that the Full Commission did not consider those records.

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**3. Workers' Compensation—evidence—stipulations—Commission to determine weight**

In a workers' compensation case, it was for the Full Industrial Commission to determine the weight to be given to the medical records of two doctors. Although the records were stipulated, nothing would have prohibited sworn opinions from the doctors.

**4. Evidence—medical—hypothetical—speculative**

The Industrial Commission did not err in a workers' compensation case by characterizing a doctor's opinion as speculative where plaintiff claimed a neck and a back injury but this doctor only treated plaintiff for her neck and had no knowledge of her back condition prior to the workplace accident. Although the doctor's opinion on plaintiff's low back symptoms was based on a hypothetical, his testimony demonstrated that his opinion of causation was based exclusively on a temporal relationship.

**5. Workers' Compensation—disability—conclusions**

The Industrial Commission did not err in a workers' compensation case in its conclusions that plaintiff was only entitled to temporary disability. The weight of the evidence was for the Commission to determine, the Commission's methods were not "too mechanical" as argued by plaintiff, and its unchallenged facts supported the conclusion of an offer of suitable employment despite plaintiff's fear of another injury.

**6. Workers' Compensation—neck injury—compensable injury medical evidence**

Medical testimony in a workers' compensation action supported the conclusion that the aggravation of plaintiff's pre-existing neck condition was caused by a workplace accident where the doctor treated plaintiff's neck injury before and after the workplace accident and testified that the accident aggravated the existing neck condition. The temporal sequence of events was not the only factor he considered and the opinion was based on more than mere speculation.

**7. Workers' Compensation—temporary disability—determination**

The Industrial Commission erred in awarding temporary total disability compensation in a workers' compensation action by not making sufficient findings regarding the effect that plaintiff's compensable neck injury had on her ability to earn wages during a particular period. The evidence before the Commission did not show

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that plaintiff was incapable of working at any employment during the relevant period.

Appeals by Plaintiff and Defendants from an Opinion and Award filed 10 February 2017 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2017.

*Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and David P. Stewart, for plaintiff-appellant.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Matthew J. Ledwith, for defendants-appellees.*

MURPHY, Judge.

Lisa A. Garrett (“Plaintiff”) and The Goodyear Tire & Rubber Company (“Goodyear”) and Liberty Mutual Insurance Company (“Liberty”) (collectively “Defendants”) appeal from an Opinion and Award filed 10 February 2017 by the North Carolina Industrial Commission. For the reasons discussed herein, we affirm in part and remand in part.

**BACKGROUND**

Plaintiff is approximately 56 years old, has a high school diploma, and previously served in the United States Navy. She first worked at the Goodyear plant in Fayetteville beginning on 12 June 2000 until sometime in 2001 when she was laid off. In 2007, Goodyear rehired Plaintiff, and on 15 June 2009, she started a new position with the company as a Production Service Carcass Trucker (“Carcass Trucker”). The Carcass Trucker position required Plaintiff to operate a stand-up, three-wheeled motorized vehicle in an industrial and warehouse setting. The position also included the following physical demands and frequencies:

- One-Hand Pull with Right Hand – 15 pounds of force
- Lift, Push, Pull to Change Battery – 30 pounds
- Pick Up Fallen Tire – 25 pounds

After working approximately one year as a Carcass Trucker, Plaintiff underwent two surgeries, a spinal fusion on 15 October 2010 and a right shoulder surgery on 29 December 2011. On 29 November 2012, Plaintiff’s treating physician, Dr. Musante of Triangle Orthopedic Associates, medically released her to return to work, and she resumed employment as a Carcass Trucker with Goodyear.

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A year later, on 15 December 2013, another employee driving a stand-up vehicle collided with Plaintiff's vehicle. This is the workplace accident triggering Plaintiff's workers' compensation claim and is the subject of this appeal. After the accident, Plaintiff initially resumed working, but she soon started "feeling something weird," and a numbness in the back of her neck. Plaintiff then reported the accident to her supervisor, received treatment at Goodyear, and went to the emergency room. Goodyear completed Industrial Commission Form 19 (Employer's Report of Employee's Injury) and stated it knew of the incident and that Plaintiff received "[m]inor on-site remedies by employer medical staff." Plaintiff then began to see several health care providers for her symptoms.

On 18 December 2013, Plaintiff saw Dr. Perez-Montes, and complained of pain in her neck and back. Dr. Perez-Montes imposed modified work (i.e. "light-duty") restrictions that included "no repetitive bending or twisting, as well as no pulling, pushing, or lifting of more than 15 pounds." Approximately two weeks after the accident, Plaintiff returned to work as a Carcass Trucker, subject to these light-duty restrictions.

Defendants assigned Plaintiff a nurse case manager, who scheduled a 9 April 2014 appointment with a pain management specialist, Dr. Kishbaugh. Dr. Kishbaugh noted that Plaintiff was suffering from "low back and leg pain, cervical and thoracic back pain, and pain in the shoulder region with numbness and tingling involving the arms." Dr. Kishbaugh referred Plaintiff for physical therapy to address her low back pain and suggested she follow up with a neurosurgeon for her neck complaints. On 21 April 2014, Plaintiff visited the office of Dr. David Musante, her treating physician after her 2010 and 2011 surgeries and the doctor who released her for work in November 2012. Plaintiff complained of neck pain to Dr. Musante's Physician's Assistant. X-rays and an MRI scan of her neck and spinal areas were ordered.

Goodyear initially accommodated Plaintiff's light-duty work restrictions, and Plaintiff continued working there as a Carcass Trucker while she received medical treatment. However, on 12 May 2014, Goodyear notified Plaintiff that it would no longer accommodate her work restrictions. Plaintiff then went on leave and began receiving accident and sickness disability benefits through an employer-sponsored plan.

While on leave, Plaintiff participated in a functional capacity evaluation ("FCE") with physical therapist Frank Murray on 29 October 2014. Two weeks later, on 13 November 2014, Dr. Kishbaugh reviewed the FCE, which concluded that Plaintiff "could perform the physical demands and

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essential functions of the ... Carcass Trucker position.” Dr. Kishbaugh determined that it was appropriate for Plaintiff to return to work, consistent with the conclusions of the 29 October 2014 FCE. Four days after Dr. Kishbaugh’s determination that Plaintiff could return to work, on 17 November 2014, Plaintiff sought and obtained a note from Dr. Musante excusing her from driving the carcass truck. Dr. Musante provided the note due to Plaintiff’s “treatment for degeneration of a cervical intervertebral disc.” Plaintiff continued to remain out of work.

On 2 January 2015, Plaintiff filed a Form 18 with the Industrial Commission giving notice of her workers’ compensation claim to Goodyear. On 29 January 2015, Plaintiff underwent an independent medical evaluation (“IME”) with Dr. Jon Wilson upon referral of Goodyear’s accident and sickness insurance carrier. Dr. Wilson concluded that Plaintiff could not at the time drive a carcass truck safely, but that she could work full time at a sedentary level. On 13 February 2015, Defendants filed a Form 63 Notice to Employee of Payment of Medical Benefits Only Without Prejudice.

Plaintiff then filed a Form 33 on 22 April 2015, requesting a hearing before the Industrial Commission because “Defendants failed to file any forms” and “treated the claims as compensable.” Almost three months later, on 16 July 2015, Goodyear made an employment offer to Plaintiff for the Carcass Trucker position at her prior wages, but Plaintiff refused the offer. Plaintiff later testified that she “did not want to return to work as a [C]arcass [T]rucker because of the bouncing nature of the truck.” Goodyear then filed a Form 61 on 18 August 2015, denying liability for the 15 December 2013 incident. This was the same day that the claim was assigned for hearing before Deputy Commissioner Phillip Baddour.

Prior to the 18 August 2015 hearing before the Deputy Commissioner, the parties stipulated that the issues to be heard were:

- (a) Whether Plaintiff’s claims should be deemed admitted based upon the actions of Defendants?
- (b) If not deemed admitted, whether Plaintiff suffered compensable injuries to her neck, low back, and bilateral shoulders?
- (c) If so, to what compensation, if any, is Plaintiff entitled?
- (d) Whether Dr. Musante should be designated as Plaintiff’s authorized treating physician for her neck and low back conditions?

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(e) Whether Plaintiff is entitled to attorney's fees pursuant to [N.C.G.S.] § 97-88.1?

Deputy Commissioner Baddour filed his Opinion and Award on 23 June 2016 and concluded that both Plaintiff's neck and low back conditions were causally related to the work accident and that she was entitled to total disability compensation from "13 May 2014 to the present and continuing until she returns to work or compensation is otherwise legally terminated." Plaintiff's bilateral shoulder condition was not compensable and she was not entitled to attorney's fees. The Deputy Commissioner's Opinion and Award also stated "[t]he Commission may not prohibit Defendants from contesting compensability of Plaintiff's claims as a sanction for Defendants' failure to timely admit or deny the claims." Defendants then filed a notice of appeal to the Full Commission.

On 10 February 2017, the Full Commission filed its Opinion and Award. The Full Commission considered several evidentiary sources, including Dr. Musante's deposition testimony, the stipulated medical records of Dr. Kishbaugh and Dr. Perez-Montes, as well as Plaintiff's statements and testimony. The Full Commission concluded that Plaintiff's low back condition was not a compensable injury but her neck condition was. Plaintiff was awarded total temporary disability compensation for her neck injury from 13 May 2014 (the date Goodyear stopped accommodating her light-duty work restrictions) to 16 July 2015 (the date Plaintiff refused Defendants' offer to return to her previous position at the same wages). Plaintiff and Defendants timely appealed this Opinion and Award. Each party alleges that the Full Commission committed several errors, and we address Plaintiff's and Defendants' issues in turn.

**STANDARD OF REVIEW**

Our review of an Opinion and Award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation and quotation marks omitted).

**PLAINTIFF-EMPLOYEE'S ISSUES ON APPEAL**

Plaintiff's appeal is addressed in three parts: (A) preservation of the estoppel issue for review by the Full Commission; (B) causation

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of Plaintiff's low back injury; and, (C) Plaintiff's determination of disability.

**A. Issue Preservation**

[1] Plaintiff first argues that the Full Commission erred in failing to consider her argument that Defendants were estopped from denying the compensability of her claims through their actions. She contends that Defendants waived their right to contest compensability of her claims because subsequent to her Form 18 Notice of Claim filing, Defendants neither admitted liability, denied liability, nor did they file a Form 63 Notice of Payment Without Prejudice regarding the claim within 30 days as required by statute and Industrial Commission Rules. *See* N.C.G.S. § 97-18(j) (2017); 04 NCAC 10A.0601 (2017) (titled Employer's Obligations Upon Notice; Denial of Liability; And Sanctions). Plaintiff also argues that after her Form 18 filing, Defendants engaged in a course of conduct, including an allegedly improper use of Form 63 designed "to direct and limit every aspect of [Plaintiff's] medical care to her medical and legal detriment" while "avoiding their legal obligation to admit or deny her claim." Without addressing the merits of Plaintiff's substantive argument, we conclude that the Full Commission erred by failing to address this issue of estoppel because Plaintiff properly raised the issue before the Deputy Commissioner and the Full Commission.

When this case was before the Deputy Commissioner, the parties' pre-trial agreement stipulated the issues to be heard. Stipulation 9 (B) of the pre-trial agreement states that Plaintiff contends the issues to be heard are:

Whether [D]efendant's accepted this claim pursuant to [N.C.G.S.] § 97-18(d), when [D]efendants took a recorded statement, provided medical treatment in the outsourced medical clinic on premises, paid for the emergency room visit, sent [Plaintiff] out for medical treatment and diagnostic studies, and assigned a nurse case manager to the file, and failed to file any Industrial Commission form either accepting or denying this claim in a timely manner and failed to send to the medical providers from whom [D]efendants required [Plaintiff] to treat the mandatory letter stating that they do not accept the claim?

The Deputy Commissioner's Opinion and Award listed the five issues to be heard and one was the issue of whether Goodyear was estopped from denying the compensability of Plaintiff's claims.

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(a) Whether Plaintiff's claims should be deemed admitted based upon the actions of Defendants?

However, the Deputy Commissioner did not adjudicate this specific issue. Conclusion of Law 1 of his Opinion and Award only states:

1. The Commission may not prohibit Defendants from contesting compensability of Plaintiff's claims as a sanction for Defendants' failure to timely admit or deny the claims. [N.C.G.S.] § 97-18(j).

When the Full Commission heard this case, it invoked the "law of the case" doctrine and determined that Plaintiff waived the issue because she did not appeal from the Deputy Commissioner's Opinion and Award. The 10 February 2017 Opinion and Award of the Full Commission states:

Plaintiff did not appeal from the [Deputy Commissioner's] Opinion and Award of June 23, 2016 as to the issues of . . . whether [D]efendants' actions constitute an acceptance of [P]laintiff's claim . . . [.] Accordingly, the Findings of Fact and Conclusions of Law issued by the Deputy Commissioner in the June 23, 2016 Opinion and Award are the law of the case as to those issues from which no appeal was taken by [P]laintiff.

It is well-established that "[t]he law of estoppel does apply in workers' compensation proceedings, and liability may be based upon estoppel to contravene an insurance carrier's subsequent attempt to avoid coverage of a work-related injury." *See e.g., Carroll v. Daniels & Daniels Construction Co.*, 327 N.C. 616, 620, 398 S.E.2d 325, 328 (1990). "[E]stoppel requires proof that the party to be estopped must have misled the party asserting the estoppel either by some words or some action or by silence." *Id.* at 621, 398 S.E.2d. at 328 (citation omitted). In a workers' compensation proceeding, "the burden is on the plaintiff to show that the [defendants] misled the plaintiff by words, acts, or silence." *Id.*

In *Lewis v. Beachview Exxon Serv.*, we addressed a situation similar to the present case. 174 N.C. App. 179, 182, 619 S.E.2d 881, 882 (2005), *rev'd on other grounds*, 360 N.C. 469, 629 S.E.2d 152 (2006). The parties' pre-trial agreement "stipulated that the issues before both the deputy commissioner and the Full Commission included 'whether defendants are estopped from denying plaintiff's pulmonary condition.'" *Lewis*, 174 N.C. App. at 182, 619 S.E.2d. at 882-83. However, the Opinion and Award included "no findings of fact or conclusions of law regarding waiver or estoppel," and we held that the "Commission failed to consider the

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application of the doctrine of estoppel to the factual scenario at hand[]” and remanded to the Commission to address the issue. *Id.* at 183, 619 S.E.2d. at 883 (citations omitted).

Regarding the “law of the case doctrine,” our Supreme Court has stated:

[a]s a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.

*Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) (internal citations and quotation marks omitted). We have further explained that the law of the case doctrine “provides that when a party fails to appeal from a tribunal’s decision that is not interlocutory, the decision below becomes the ‘law of the case’ and cannot be challenged in subsequent proceedings in the same case.” *Boje v. D.W.I.T., L.L.C.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009). In *Boje*, the Deputy Commissioner’s Opinion and Award included a finding of fact that the defendant did not have workers’ compensation coverage on the date of the plaintiff’s accident. *Id.* There, the defendant did not appeal the finding to the Full Commission, and we held that this finding was the law of the case and the defendant was “barred from relitigating that issue in subsequent proceedings.” *Id.*

However, “[t]he doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a flexible discretionary policy which promotes the finality and efficiency of the judicial process.” *Goetz v. N.C. Dep’t of Health & Human Servs.*, 203 N.C. App. 421, 432, 692 S.E.2d 395, 403 (2010) (quotation marks omitted). Moreover, the Full Commission “is not an appellate court” and “[t]he Commission may not use its own rules to deprive a plaintiff of the right to have his case fully determined.” *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). In *Joyner*, we observed:

[a]lthough it hardly need be repeated, that the “[F]ull Commission” is not an appellate court in the sense that it reviews decisions of a trial court. It is the duty and responsibility of the [F]ull Commission to make detailed

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findings of fact and conclusions of law with respect to every aspect of the case before it.

*Id.*

In the case at bar, Defendants maintain that the issue of whether they should be estopped from denying Plaintiff's claims was not before the Full Commission because Plaintiff did not appeal the Deputy Commissioner's Opinion and Award. However, since there were no findings or conclusions in the Deputy Commissioner's Opinion and Award that addressed the issue of estoppel, the issue was not adjudicated, and there was nothing for Plaintiff to appeal to the Full Commission. Although labeled as a "Conclusion of Law," the Deputy Commissioner's Conclusion of Law 1 is not a legal conclusion because it is not the result of the application of legal principles to evidentiary facts. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law."). Rather, Conclusion of Law Number 1 merely paraphrases a statutory provision with potential relevance to the issue of Plaintiff's estoppel claim. It reads:

1. The Commission may not prohibit Defendants from contesting compensability of Plaintiff's claims as a sanction for Defendants' failure to timely admit or deny the claims. [N.C.G.S.] § 97-18(j).<sup>1</sup>

"While the Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends." *Lewis*, 174 N.C. App. at 182, 619 S.E.2d at 883 (citation omitted). More specifically, "the Commission must address the issue of estoppel[]" when the issue is raised. *Id.* Here the issue of estoppel was raised before the Deputy Commissioner via the pre-trial agreement and in Plaintiff's brief to the Full Commission. Nevertheless, the Full Commission "failed to consider the application of the doctrine of estoppel to the factual scenario at hand." *Id.* Additionally, by invoking the law of the case doctrine, the

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1. Specifically, N.C.G.S. § 97-18(j) provides that the Commission may order reasonable sanctions against an employer that does not, within 30 days following the notice of an employee's claim from the Commission either admit, deny, or initiate payments without prejudice and when such sanctions are ordered, "shall not prohibit the employer or insurer from contesting the compensability of or its liability for the claim." N.C.G.S. § 97-18(j) (2017).

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Full Commission avoided its duty to “make detailed findings of fact and conclusions of law with respect to every aspect of the case before it.” *Joyner*, 92 N.C. App. at 482, 374 S.E.2d at 613. This deprived Plaintiff of her right to have her case fully and finally determined.<sup>2</sup> We remand this matter to the Industrial Commission to consider whether the facts of this case support a conclusion that Defendants should be estopped from denying the compensability of Plaintiff’s claims. Should the Full Commission determine that the doctrine of estoppel applies, it should determine whether Defendants are liable for the workers’ compensation benefits. The Full Commission should rely on the findings of fact already made and may make any additional findings it deems necessary.

**B. Causation of Plaintiff’s Low Back Injury**

[2] Plaintiff next contends that the Full Commission erred by concluding she failed to prove that her low back condition was caused by the December 2013 workplace accident. We disagree.

“The claimant in a workers’ compensation case bears the burden of initially proving each and every element of compensability, including a causal relationship between the injury and his employment.” *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (2005) (citations and internal quotation marks omitted). “[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.” *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (citations omitted). However, “an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.” *Id.*

We have held that an expert medical opinion stating an accident “could,” “might have” or “possibly” caused an injury is generally insufficient to prove medical causation. *See Carr v. Dep’t of Health & Human*

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2. Defendants also argue that Plaintiff waived the issue of whether her claims should be deemed admitted based upon the actions of Defendants because she did not submit a Form 44 Application for Review to the Full Commission. *See* 04 NCAC 10A.0701(d) (April 2018). Since Plaintiff did not appeal any finding or conclusion of the Deputy Commissioner to the Full Commission, from a procedural standpoint, Plaintiff was the appellee before the Full Commission. The Industrial Commission rules do not require an appellee to submit a Form 44, only the appellant. *See* 04 NCAC 10A.0701(e) (April 2018). The appellee is, however, required to submit a brief, and Plaintiff did submit a brief raising the specific issue of whether Plaintiff’s claims should be deemed admitted based upon the actions of Defendants.

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*Servs.*, 218 N.C. App. 151, 155, 720 S.E.2d 869, 873 (2012) (citations omitted). However, “supplementing that opinion with statements that something ‘more than likely’ caused an injury or that the witness is satisfied to a ‘reasonable degree of medical certainty’ has been considered sufficient” to establish causation under the Workers Compensation Act. *Id.* (citing *Young*, 353 N.C. at 233, 538 S.E.2d at 916; *Kelly v. Duke Univ.*, 190 N.C. App. 733, 740, 661 S.E.2d 745, 749 (2008)).

Here, the Full Commission concluded that Plaintiff “failed to present competent medical expert opinion evidence, as required by our case law, to establish a relationship between her low back condition and the December 15, 2013 workplace accident.” Plaintiff contends that this conclusion was erroneous because the Full Commission ignored the stipulated medical records of Dr. Perez-Montes and Dr. Kishbaugh, and improperly discounted the medical opinion testimony of Dr. Musante, and characterized it as “speculative.” As to both arguments, we disagree.

“It is reversible error for the Commission to fail to consider the testimony or records of a treating physician.” *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 784 (2003). In *Whitfield*, the appellant argued that the Commission erred by wholly disregarding the stipulated medical records of the plaintiff’s treating physicians. *Id.* at 348, 581 S.E.2d at 783. We disagreed, and noted that the Commission made numerous findings concerning plaintiff’s visits to these doctors. *Id.* at 349, 581 S.E.2d at 784. The Commission “simply accorded greater weight” to the expert medical opinion of a doctor who provided sworn deposition testimony, as it is entitled to do. *Id.* Similarly, here the Full Commission’s Opinion and Award included several findings of fact that reference Plaintiff’s stipulated medical records.<sup>3</sup> Plaintiff is therefore unable to show that the Full Commission failed to consider these medical records because a number of findings in the Opinion and Award expressly reference these records, the physicians who provided them, and the information contained therein.

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3. The Full Commission’s consideration of Dr. Perez-Montes and Dr. Kishbaugh’s medical records is evinced by Findings of Fact 7, 8, 9, and 10. *See* I.C. No. 13-007190, N.C. Indus. Comm’n, *Opinion And Award*, p. 8 (Feb. 10 2017) (“9. On December 18 2013, [P]laintiff presented to Dr. Marcelo R. Perez-Montes . . . for follow-up after her work incident of December 15, 2013. . . He diagnosed musculoskeletal pain and cervical spasm”); *Id.* at 9 (“8. Dr. Perez-Montes ordered a lumbar spine MRI[.]”); *Id.* (“9. . . . Dr. Perez Montes diagnosed degenerative disc disease/facet syndrome of the lower spine and referred [P]laintiff to pain management treatment.”); *Id.* (“10. At Plaintiff’s initial appointment on April 9, 2014, Dr. Kishbaugh noted low back and leg pain, cervical and thoracic back pain, and pain in the shoulder region with numbness and tingling involving the arms.”).

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[3] Plaintiff also claims that the Full Commission did not give “proper weight” to these stipulated medical records during their review. However, “[i]t is for the Commission to determine . . . the weight to be given the evidence, and the inferences to be drawn from it.” *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 124 (2002). Moreover, when medical records are stipulated to, the only aspect of the records the parties are stipulating to is their authenticity. In *Hawley v. Wayne Dale Const.*, we noted that “stipulating to the record’s authenticity is not the same as stipulating to the accuracy of the diagnosis,” nor does such stipulation “preclude taking a deposition, calling the author as a witness or introducing contrary evidence.” *Hawley v. Wayne Dale Const.*, 146 N.C. App. 423, 429, 552 S.E.2d 269, 273 (2001). Although the medical records of Dr. Perez-Montes and Dr. Kishbaugh were stipulated, nothing would have prohibited these physicians from providing a sworn medical opinion regarding the cause of Plaintiff’s lower back condition. However, neither doctor was deposed, and it was for the Full Commission to determine the weight to be given to their records and the inferences to be drawn from them.

[4] Plaintiff’s final argument regarding her low back condition is that the Full Commission improperly characterized Dr. Musante’s medical opinion as “speculative” because it was based upon a hypothetical. Finding of Fact 27 of the Full Commission stated:

27. The Commission finds that Dr. Kishbaugh, having treated [P]laintiff’s low back since April 2014, would have been in the best position to provide an expert medical opinion as to the cause of plaintiff’s low back condition. However, neither party obtained deposition testimony or a written opinion from Dr. Kishbaugh as to this issue, and the Commission finds that Dr. Musante’s opinion as to the cause of [P]laintiff’s low back condition is insufficient to establish a causal relationship between [P]laintiff’s low back condition and the work incident of December 15, 2013 given its speculative nature and the fact that Dr. Musante has never evaluated or treated [P]laintiff’s low back.

This finding was based on Dr. Musante’s deposition testimony, which was in part based on a hypothetical. Regarding Plaintiff’s back condition, Dr. Musante testified:

*I can only speculate about her back because I don’t have any recollection of symptoms prior to, or knowledge of*

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her back prior to this accident. I would simply answer in terms of what I've seen here and in a *hypothetical*. If she reported to me she had no history of seeking medical attention for her back and had no problems with her back prior to this accident, and then began to have back and leg symptoms, I would conclude that the accident caused or aggravated most likely some previously asymptomatic lumbar pathology.

While an expert medical opinion based on a hypothetical may be admissible as competent evidence in workers' compensation proceedings, it cannot be based on conjecture and speculation. *See Haponski v. Constructor's, Inc.*, 87 N.C. App 95, 100-03, 360 S.E.2d 109, 112-13 (1987). Additionally, a medical opinion that relies exclusively on the maxim of "*post hoc, ergo propter hoc*" is speculative incompetent evidence of causation. *See Young*, 353 N.C. at 232, 538 S.E.2d at 916; *see also Pine v. Wal-Mart Assocs. Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 804 S.E.2d 769, 777 (2017) ("[E]xpert medical testimony based solely on the maxim '*post hoc, ergo propter hoc*'—which 'denotes the fallacy of ... confusing sequence with consequence'—does not rise to the necessary level of competent evidence.").

In *Young*, a medical expert was asked to provide an opinion on whether the plaintiff's fibromyalgia was causally related to a workplace accident. *Young*, 353 N.C. at 232, 538 S.E.2d at 916. The expert testified:

I think that she does have fibromyalgia and I relate it to the accident primarily because, as I noted, it was not there before and she developed it afterwards. And that's *the only piece of information that relates* the two.

*Id.* (emphasis added). Our Supreme Court held that this opinion relied solely on the maxim *post hoc, ergo propter hoc*, and was therefore "not competent evidence of causation." *Id.*

In the instant case, Plaintiff claimed that the December 2013 workplace accident caused a neck injury and a low back injury. However, Dr. Musante only treated Plaintiff for her neck, not for her back, and he had no knowledge of her back condition prior to the December 2013 workplace accident. Although his opinion regarding the cause of Plaintiff's low back symptoms was based on a hypothetical, which is not incompetent evidence *per se*, Dr. Mustante's testimony demonstrated that his opinion as to causation was based exclusively on the temporal relationship between the date the claimant sought medical attention and the date of the workplace accident. Therefore, Dr. Musante's *post hoc ergo*

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*propter hoc* testimony was insufficient to establish a causal relationship between Plaintiff's low back condition and the December 2013 workplace accident.

Based on the foregoing, the Full Commission did not err by concluding Plaintiff failed to prove that her low back condition was caused by the 15 December 2013 workplace accident.

**C. Determination of Plaintiff's Disability**

**[5]** Plaintiff's remaining issue contends that the Full Commission misapplied the law in analyzing her disability claims. We disagree.

A determination of disability is a conclusion of law we review de novo. *Pine*, \_\_\_ N.C. App. at \_\_\_, 804 S.E.2d at 773. "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citation omitted); *see also Weaver v. Dedmon*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 801 S.E.2d 131, 133 (2017) ("A decision by the North Carolina Industrial Commission that contains contradictory factual findings and misapplies controlling law must be set aside and remanded to the Commission[.]"). "Disability" is defined as an "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C.G.S. § 97-2(9) (2017). To support a conclusion of disability, "the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citing N.C.G.S. § 97-2(9)). The plaintiff bears the burden of proof to establish disability, but once the plaintiff has done so, the burden shifts to the defendant "to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Wilkes v. City of Greenville*, 369 N.C. 730, 745, 799 S.E.2d 838, 849 (2017) (citations omitted). Additionally, under N.C.G.S. § 97-32, "[i]f an injured employee refuses suitable employment . . . the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C.G.S. § 97-32 (2017).

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Plaintiff does not challenge any specific findings made by the Full Commission as unsupported by the evidence. Rather, Plaintiff argues that the Full Commission erred in concluding she was only entitled to temporary disability for her neck injury from 12 May 2014 (the date Goodyear no longer accommodated her “light-duty” work restrictions imposed by Dr. Perez-Montes) to 16 July 2016 (the date Goodyear extended an offer of employment for Plaintiff to return to her previous position as a Carcass Trucker). Plaintiff advances several different theories, none we find prevailing.

Plaintiff first argues that the Full Commission erred by affording greater weight to the medical opinion of Mr. Murray (the licensed physical therapist who conducted Plaintiff’s Functional Capacity Evaluation), than the medical opinion of Dr. Wilson. We again note that it is for the Commission to determine the weight to be given the evidence, and the inferences to be drawn from it. *Rackley*, 153 N.C. App. at 472, 570 S.E.2d at 124. “We will not reweigh the evidence before the Commission[.]” *Beard v. WakeMed*, 232 N.C. App. 187, 191, 753 S.E.2d 708, 711 (2014).

Second, Plaintiff contends that the Full Commission erred by “mechanically” employing the disability methods set forth in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993).<sup>4</sup> Plaintiff is correct in that the *Russell* methods “are neither statutory nor exhaustive” and “are not the only means of proving disability.” *Wilkes*, 369 N.C. at 745, 799 S.E.2d at 849 (citing *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 422, 760 S.E.2d 732, 737 (2014)). Nonetheless, the Full Commission’s findings and conclusions clearly indicate that it understood that it is not limited to the *Russell* methods to determine if the ultimate standard of disability set forth in *Hilliard* and N.C.G.S. § 97-2(9) is met.<sup>5</sup> Moreover, Plaintiff’s argument that the Full Commission was “too mechanical” in the application of the *Russell* factors is, in essence, a

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4. Under *Russell*, the employee may prove disability “in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.” *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted).

5. Conclusion of Law 4 of in the Full Commission’s Opinion and Award states that the “*Russell* factors are not exhaustive and do not preclude the Commission from considering other means of satisfying the ultimate standard of disability set forth in *Hilliard*. See *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 760 S.E.2d 732 (2014).”

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request for us to reweigh the evidence, which we will not do. *Hall v. U.S. Xpress, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 808 S.E.2d 595, 605 (2017).

Plaintiff also contends that the Full Commission erred by concluding that she unjustifiably refused an offer of suitable employment by refusing to return to her previous position as a Carcass Trucker on 16 July 2015. She challenges Conclusion of Law 5 of the Full Commission's Opinion and Award:

5. Plaintiff admittedly refused to return to her pre-injury job, which defendant employer offered to her by letter of July 16, 2015, despite being released to that job by Dr. Kishbaugh and Dr. Musante based upon the valid and reasonable FCE performed by Mr. Murray. Accordingly, the Commission concludes that [P]laintiff unjustifiably refused suitable employment as of July 16, 2015. [N.C.G.S.] § 97-2(22) (2016).

N.C.G.S. § 97-32 precludes compensation if an injured employee unjustifiably refuses to accept an offer of "suitable employment."

If an injured employee refuses suitable employment as defined by [N.C.G.S. §] 97-2(22), the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

N.C.G.S. § 97-32 (2017). N.C.G.S. § 97-2(22) defines "suitable employment" as:

employment offered to the employee or . . . employment available to the employee that (i) prior to reaching maximum medical improvement is within the employee's work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee's authorized health care provider or (ii) after reaching maximum medical improvement is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located within a 50-mile radius of the employee's residence at the time of injury or the employee's current residence if the employee had a legitimate reason to relocate since the date of injury. No one factor shall be considered exclusively in determining suitable employment.

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N.C.G.S. § 97-2(22) (2017), amended by 2015 N.C. Sess. Laws 286. Accordingly, our review of this argument is limited to determining whether the Full Commission's unchallenged findings of fact support the conclusion that Goodyear made Plaintiff an offer of "suitable employment," and that Plaintiff unjustifiably refused this offer.

By letter dated 16 July 2015, Goodyear offered Plaintiff her pre-injury position as a Carcass Trucker. Plaintiff did not accept this offer. At the time Goodyear made the offer, the unchallenged findings demonstrate that Plaintiff had already been medically cleared by one of her doctors to perform the duties of a Carcass Trucker. This clearance was based on the results of Plaintiff's 29 October 2014 FCE. Specifically, Finding of Fact 17 states:

17. Plaintiff returned to Dr. Kishbaugh on November 13, 2014, at which time he reviewed the FCE by Mr. Murray. As noted by Dr. Kishbaugh, [P]laintiff expressed concern that she would "hurt" after sitting or riding in a truck for a full shift. However, [P]laintiff did not express concerns about cervical rotation needed to drive the carcass truck. Dr. Kishbaugh assessed [P]laintiff at maximum medical improvement . . . and encouraged her to discuss retirement versus return to work options with defendant-employer, although it was appropriate for [P]laintiff to return to work per the FCE conclusions.

Plaintiff maintains that assuming *arguendo* she was physically capable of returning to her pre-injury employment as a Carcass Trucker, it was still error for the Full Commission to conclude that her refusal to accept Goodyear's 16 July 2015 employment offer was unjustifiable. Plaintiff asserts that her refusal to accept Goodyear's employment offer was not "unjustifiable" because she feared she would suffer another injury while working in that position. Plaintiff principally relies on *Bowden v. Boling Co.* to support her argument. *Bowden v. Boling Co.*, 110 N.C. App. 226, 429 S.E.2d 394 (1993).

In *Bowden*, the employee worked in a furniture factory and was injured when a machine malfunctioned and collapsed on his left arm, trapping him for forty-five minutes. *Id.* at 228-29, 429 S.E.2d at 395-96. The accident caused third-degree burns, as well as severe muscle and nerve damage, and the employee was diagnosed as having a 100% disability of his left arm. *Id.* After the employee reached maximum medical improvement, the defendant-employer offered him three jobs in the same factory. *Id.* However, these jobs would have required the employee

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to use the same kinds of machines that trapped, injured, and caused him to lose the ability to use his left arm. The Full Commission concluded that the jobs offered by the employer to the employee “were not suitable for his capacity” and that his refusal to accept them did not preclude compensation. *Id.* at 231, 429 S.E.2d at 397. The employer appealed and argued “that even if [a] plaintiff’s fear is reasonable, the fear of returning to work after an injury does not render an employee totally disabled under the Workers’ Compensation Act.” *Id.* at 213, 429 S.E.2d. at 398. We disagreed and affirmed the Full Commission, reasoning:

if a person’s fear of returning to work renders the job unsafe for his performance then it is illogical to say that a suitable position has been offered. Although plaintiff may be able to perform work involving the use of his right arm, the availability of positions for a person with one functional arm does not in itself preclude the Commission from making an award for total disability if it finds upon supported evidence that plaintiff because of other preexisting conditions is not qualified to perform the kind of jobs that might be available in the marketplace. While the positions offered to plaintiff by defendants may in fact be performed by a person with only one functional arm, the question is whether the jobs could be performed safely by this plaintiff.

*Id.* at 232-33, 429 S.E.2d at 398 (citation omitted).

The instant case is distinguishable from *Bowden* because it involves a drastically different set of factual circumstances. In *Bowden*, the injured employee lost the ability to use his left arm after a “machine used to steam and bend pieces of wood” collapsed on his arm and trapped him for 45 minutes. *Id.* at 228, 429 S.E.2d at 396. This injury was so severe that it required treatment at the Burn Unit at North Carolina Memorial Hospital. Here, Plaintiff was operating a low-speed battery-powered utility vehicle (in essence, a forklift) when another Goodyear employee operating a similar vehicle collided with Plaintiff’s vehicle. Unlike *Bowden*, Plaintiff did not go to the ER immediately after the accident. In fact, after the collision, she retained the mental and physical wherewithal to engage in a heated verbal altercation with the employee who struck her vehicle,<sup>6</sup> and resume her normal work activity. After

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6. Plaintiff made a recorded statement at her home to a Liberty Mutual Insurance representative, and recounted the altercation as follows: “[a]ll right, someone slammed into me . . . I saw a flash of person flying by going up the main aisle[.] . . . he came flying

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feeling “something weird,” and reporting “numbness” to Goodyear’s in-house medical staff, Plaintiff went to urgent care, took two weeks off, and came back to work. Then, for the next 15 months, Plaintiff continued to drive the same work vehicle she was operating when the accident occurred. In light of these differences between *Bowden* and the present case, we conclude that *Bowden* is not determinative on this issue.

Plaintiff also contends the Full Commission’s Opinion and Award failed to address her argument regarding her fear of driving the carcass truck. We reject this contention and have previously held that:

The Full Commission must make definitive findings to determine the critical issues raised by the evidence, and in doing so must indicate in its findings that it has “considered or weighed” all testimony with respect to the critical issues in the case. It is not, however, necessary that the Full Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Full Commission. . . . *Such “negative” findings are not required.*

*Boylan v. Verizon Wireless*, 224 N.C. App. 436, 443, 736 S.E.2d 773, 778 (2012) (citations omitted) (emphasis added). While it is true that the Full Commission did not make any specific findings regarding any potential effect that Plaintiff’s alleged “fear” of operating a carcass truck would have on her ability to safely perform the duties of that job, it is clear that the Full Commission made those findings necessary to support its conclusion that Plaintiff unjustifiably refused Goodyear’s offer of suitable employment. Plaintiff’s contention that the Commission “failed to address” her fear of driving argument is a request for us to require the Industrial Commission to make “negative findings” to support its conclusion (i.e., Plaintiff was not afraid of driving the carcass truck). *See id.* This is something we will not do.

As our review of this is limited to determining whether the Full Commission’s findings support its conclusions, we hold that that Findings of Fact 17, 31, 32, 33, 34, 35, and 37 adequately support the conclusion that Goodyear made an offer of “suitable employment” and Plaintiff unjustifiably refused this offer. Finding of Fact 17 states that as of 13 November, 2014, Dr. Kishbaugh was of the opinion that “it was

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back, jumped out of his truck and came at me telling me ‘I was a cunt from hell, I was a bitch that needed to be put down’ and I told him to ‘take your tiny dick and move on.’ . . . We had a confrontation for some time.”

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appropriate for plaintiff to return to work per the FCE conclusions.” Finding of Fact 31 states that “[b]y letter dated July 16, 2015, . . . defendant-employer offered [P]laintiff to return to work in her pre-injury position as a Production Service Carcass Trucker.” Finding of Fact 32 states that “Plaintiff did not return to her pre-injury position as offered.” Finding of Fact 33 states that “Dr. Musante testified that . . . [P]laintiff would not suffer any harm in driving the truck required of her pre-injury job” and though “driving the truck may cause [P]laintiff to suffer a flare in her symptoms and hurt, doing so posed no risk of harm to [P]laintiff.” Dr. Musante also testified that “it appeared that Plaintiff was trying to not do that job.” Findings of Fact 34 and 35 also demonstrate that Plaintiff’s treating physicians believed she was “capable of much more than sedentary-duty work,” and the work restrictions recommended in her FCE, if implemented, would allow her to work “in her pre-injury position as a Production Service Carcass Trucker.” These findings sufficiently demonstrate that the job offered was “within the employee’s work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee’s authorized health care provider.” See N.C.G.S. § 97-2(22) (defining suitable employment).

Furthermore, Finding of Fact 37 supports the conclusion that Plaintiff’s refusal to accept Goodyear’s offer was unjustifiable. This finding states that Plaintiff “did not want to return to work as a [C]arcass [T]rucker because of the bouncing nature of the truck,” and that she testified that she “can’t be bounced around like that.” Plaintiff’s own testimony counters any claim that her refusal was justified under the rationale of *Bowden*, which stands for the proposition that “if a person’s fear of returning to work renders the job unsafe for his performance then it is illogical to say that a suitable position has been offered” and that the relevant question is whether the jobs available are jobs that “could be performed safely by this plaintiff.” *Bowden*, 110 N.C. App. at 232-33, 429 S.E.2d at 398. Plaintiff’s testimony was that she was “afraid of getting hit again,” “afraid of her disk getting worse” and she “can’t be bounced around like that.” She argues that this evidence clearly establishes that her refusal to return to work as a Carcass Trucker was justified. However, Plaintiff’s interpretation of her own testimony is not the only reasonable interpretation, and “[i]t is for the Commission to determine the credibility of the witnesses, the weight to be given the evidence, and the inferences to be drawn from it.” *Rackley*, 153 N.C. App. at 472, 570 S.E.2d at 124.

Accordingly, we affirm the Full Commission’s conclusion that Plaintiff unjustifiably refused an offer of suitable employment on 16 July

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2016, and was not entitled to disability compensation for her neck injury after that date.

**DEFENDANTS' ISSUES ON APPEAL**

Defendants raise two issues on appeal. They first argue that the Full Commission erred in concluding that Plaintiff's cervical neck condition is compensable. Defendants also argue that the Full Commission erred by failing to enter sufficient findings to support the conclusion that Plaintiff was disabled from 13 May 2014 to 16 July 2015.

**A. Causation of Plaintiff's Neck Injury**

**[6]** Regarding the compensability of Plaintiff's neck injury, Conclusion of Law 3 of the Full Commission's Opinion and Award states:

3. Based on the expert medical opinion of Dr. Musante, the Commission concludes that the workplace accident of December 15, 2013 caused or contributed to [P]laintiff's current neck condition by materially aggravating her pre-existing, asymptomatic neck condition, thereby rendering it a compensable injury by accident.

Dr. Musante was Plaintiff's treating physician for her cervical neck condition during her 2011 and 2012 surgeries and also after the December 2013 workplace accident. During his deposition, Dr. Musante testified that it was his opinion that the workplace accident contributed to or aggravated the underlying pre-existing asymptomatic condition in the neck:

Q. What is that opinion?

A. The—my opinion is that the accident contributed to or aggravated an underlying preexisting minimally to asymptomatic condition in the neck. . . I can only speculate about her back[.]

. . .

Q. And is that medical opinion within a reasonable degree of medical certainty?

A. Yes.

Dr. Musante based this opinion on his treatment history with Plaintiff and his clinical evaluation of her neck injury:

Q. And is that medical opinion based upon your training, your clinical evaluation, your education, your experience,

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the medical literature and your familiarity since 2010 with [Plaintiff] and her medical conditions?

A. Yes, for the neck.

....

A. So it would be – it was based – I was actually treating her for her cervical spine in January. I made my conclusion based upon the history that she provided and the imaging that I had.

....

Q. Would you say that what takes you from the incident could have been or is a possible cause of her pain to saying more likely than not it is a cause of her pain is solely the temporal nature of her complaints?

Plaintiff's Counsel: Objection

A. I would say that the temporal nature, the fact that she wasn't seeking attention from me prior to the accident, and then began seeking attention[.]

Defendants argue that Dr. Musante's deposition testimony was insufficient to support the Full Commission's conclusion that Plaintiff's neck condition was a compensable injury. Specifically, Defendants contend that Dr. Musante's testimony only went to whether Plaintiff's "pain complaints" were related to the workplace accident. Defendants also maintain that his testimony was "speculative" because it relied on the temporal nature of Plaintiff's complaint history before and after the incident. As to both theories, we disagree.

Regarding Defendants' theory that Dr. Musante's testimony only went to whether Plaintiff's pain complaints were related to the workplace accident, we initially note that "when treating pain patients, a physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law." *Yingling v. Bank of Am.*, 225 N.C. App. 820, 836, 741 S.E.2d 395, 406 (2013) (citations, quotation marks, and alterations omitted). Furthermore, it is well-established that an aggravation of a pre-existing condition can be a compensable injury under the Workers' Compensation Act. *Morrison v. Burlington Indus.*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981) (stating that "[a]n employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses" and a workers' compensation claimant can be compensated for the "aggravation and

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acceleration of a pre-existing infirmity.”). Here, Dr. Musante’s medical opinion was that the December 2013 accident “aggravated an underlying pre-existing minimally to asymptomatic condition in the neck.” This is a compensable injury under the Workers’ Compensation Act. *Id.* Moreover, his testimony did not only address Plaintiff’s own reports of pain. Dr. Musante testified that his medical opinion was also based on Plaintiff’s medical history, MRI images and X-rays.

Similarly, Defendants’ contention that Dr. Musante’s opinion regarding Plaintiff’s neck injury was “speculative” incompetent evidence of causation because it relied on the temporal nature of Plaintiff’s complaint history is also without merit. *Young*, discussed in greater detail *supra*, held that “expert medical testimony based *solely* on the maxim ‘*post hoc, ergo propter hoc*’—which ‘denotes the fallacy of ... confusing sequence with consequence’—does not rise to the necessary level of competent evidence.” See *Pine*, \_\_\_ N.C. App. at \_\_\_, 804 S.E.2d at 777 (citing *Young*, 353 N.C. at 232, 538 S.E.2d at 916). However, an expert is not always precluded from relying on the temporal sequence of events (e.g. “*post hoc, ergo propter hoc*”) in forming his or her opinion as to the cause of a claimant’s injury. For example, in *Pine*, we distinguished that case from *Young* “[b]ecause a full review of [the expert’s] testimony demonstrate[d] that his opinion *was based on more than merely post hoc, ergo propter hoc*, and went beyond a ‘could’ or ‘might’ testimony[.]” *Pine*, \_\_\_ N.C. App. at \_\_\_, 804 S.E.2d at 778 (emphasis added).

Here, Dr. Musante did consider the temporal relationship between the date of Plaintiff’s workplace accident and the dates she sought medical attention. However, the temporal sequence of events was not the only factor he considered. Unlike his opinion regarding the cause of Plaintiff’s low back condition, Dr. Musante’s opinion regarding the cause of Plaintiff’s neck injury was not based “solely” on *post hoc, ergo propter hoc* reasoning. Dr. Musante was Plaintiff’s treating physician for her neck condition and had been since 2010. He also conducted physical exams of Plaintiff and reviewed MRI images. Relying on all of this information, in addition to the temporal sequence of events surrounding the December 2013 workplace accident, Dr. Musante testified that it was his medical opinion “within a reasonable degree of medical certainty” that the workplace accident caused Plaintiff’s neck injury. This medical opinion was based on more than mere speculation.

Our role is “limited to reviewing whether *any competent evidence* supports the Commission’s findings of fact and whether the findings of fact support the Commission’s conclusions of law.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (emphasis

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added). In light of this role, we conclude that Dr. Musante's testimony supported the conclusion that the aggravation of Plaintiff's pre-existing neck condition was caused by the December 2013 workplace accident and was a compensable injury.

**B. Temporary Disability Determination**

[7] The Full Commission concluded that Plaintiff was entitled to temporary total disability compensation for the period of 13 May 2014 to 16 July 2015 for her neck injury. Defendants argue that the Commission erred by failing to enter sufficient findings to support the conclusion that Plaintiff was disabled from 13 May 2014 to 16 July 2015. We agree and conclude that the Commission failed to make sufficient findings regarding the effect that Plaintiff's compensable neck injury had on her ability to earn wages between 13 May 2014 and 16 July 2015.

A determination of disability is a conclusion of law we review de novo, and "the claimant has the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). In addition to proving that a compensable injury occurred as the result of a workplace accident, a plaintiff must also prove (1) she was "incapable after her injury of earning the same wages earned prior to injury in *the same employment*," (2) she was "incapable after her injury of earning the same wages she earned prior to injury in *any other employment*," and (3) her "incapacity to earn wages was caused by [her] injury." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683 (emphasis added). "After the plaintiff meets her burden to establish disability, the burden shifts to the employer to show not only that suitable jobs are available, but also that the [employee] is capable of getting one, taking into account both physical and vocational limitations." *Cross v. Falk Integrated Techs., Inc.*, 190 N.C. App. 274, 279, 661 S.E.2d 249, 253-54 (2008) (citations omitted). "An employer can overcome the presumption of disability by providing evidence that: (1) suitable jobs are available for the employee; (2) that the employee is capable of getting said job taking into account the employee's physical and vocational limitations; (3) and that the job would enable employee to earn *some* wages." *Id.* (emphasis added).

We have often stated that the Commission must make specific findings that address the "crucial questions of fact upon which plaintiff's right to compensation depends." *Wilkes*, 369 N.C. at 746, 799 S.E.2d at 850 (citing *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E.2d 596, 599 (1955)); see also *Singleton v. Durham Laundry Co.*, 213 N.C. 32, 34-35, 195 S.E. 34, 35 (1938) ("It is the duty of the Commission

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to make such specific and definite findings upon the evidence reported as will enable this Court to determine whether the general finding or conclusion should stand, particularly when there are material facts at issue.”).

For example, in *Carr*, like the instant case, the Commission concluded that the plaintiff was entitled to temporary total disability. *Carr*, 218 N.C. App. at 151, 720 S.E.2d at 869. We remanded because the Commission failed to make necessary findings. Specifically, we held that before the Commission could conclude that the claimant was entitled to temporary total disability compensation, it must make findings as to “whether plaintiff has made a reasonable effort to obtain employment, but been unsuccessful, or that it would be futile for plaintiff to seek work because of preexisting conditions.” *Id.* at 158, 720 S.E.2d at 875. We reached this result because the medical evidence did not show claimant was incapable of working in any employment. *Carr*, 218 N.C. App. at 157, 720 S.E.2d at 875.

More recently, in *Wilkes v. City of Greenville*, our Supreme Court remanded a decision of the Commission because the Commission did not make any findings addressing how the plaintiff’s injury “may have affected his ability to engage in wage-earning activities.” *Wilkes*, 369 N.C. at 747-48, 799 S.E.2d at 850. The plaintiff in *Wilkes* was employed as a landscaper and was injured in a motor vehicle accident during the course of employment. *Id.* at 732, 799 S.E.2d at 841. In concluding that the plaintiff was disabled, the Commission found that he had suffered “severe tinnitus” as the result of the accident. *Id.* at 732, 799 S.E.2d at 841. However, while the Commission’s findings indicated that the plaintiff had “numerous pre-existing limitations” that affected his ability to earn wages in other employment after the workplace accident,<sup>7</sup> “the Commission made no related findings on how the plaintiff’s compensable tinnitus . . . affected his ability to engage in wage-earning activities.” *Id.* Our Supreme Court remanded to the Commission to “take additional evidence if necessary and to make specific findings addressing the plaintiff’s wage-earning capacity, considering his compensable tinnitus in the context of all the pre-existing and coexisting conditions bearing upon his wage-earning capacity.” *Id.*

In the present case, the Full Commission concluded that Plaintiff’s neck injury was compensable, and that she was entitled to temporary

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7. For example, the plaintiff in *Wilkes* was over the age of sixty, had an IQ under 70, and had a limited education and work experience. *Wilkes*, 369 N.C. at 745, 799 S.E.2d at 849.

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total disability for her neck injury. The findings of the Commission support the conclusion that Plaintiff was unable to earn the same wages in the “same employment” during the period of temporary total disability because Goodyear no longer accommodated her light-duty work restrictions after 13 May 2014. However, the Opinion and Award does not sufficiently address how Plaintiff’s neck injury affected her ability to engage in all wage-earning activities after 13 May 2014. The evidence before the Commission did not show that Plaintiff was incapable of working in any employment between the dates of 13 May 2014 and 16 July 2015. Plaintiff’s “light-duty” work restrictions only required her to refrain from some, but not all work activities.<sup>8</sup> Also, as of 29 January 2015, Plaintiff’s doctors believed she was capable of working full time in a sedentary position. Like *Carr*, the evidence here showed that Plaintiff was not incapable of working in any employment. However, the Full Commission failed to make any findings addressing whether after a reasonable effort on Plaintiff’s part, she had been unsuccessful in her effort to obtain employment, or it would have been futile for her to seek other employment. As such, there are no findings addressing whether Plaintiff had any limitations that precluded her from obtaining “*any other employment*” at the same wages. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683 (emphasis added). As in *Carr*, we cannot determine what evidence Plaintiff introduced to meet her burden to show that her inability to find equally lucrative work in any other employment between the dates of 13 May 2014 and 16 July 2015 was caused by her compensable neck injury.

Based upon the record before us, we cannot affirm the award. Accordingly, we remand this case to the Commission. On remand, the Commission shall make specific findings addressing Plaintiff’s wage-earning capacity, considering her compensable neck injury in the context of all the preexisting and coexisting conditions, as well as all vocational limitations bearing upon her wage-earning capacity.

**CONCLUSION**

We affirm in part and remand in part. We affirm the Commission’s conclusions that: (1) Plaintiff failed to prove that her low back condition was caused by the December 2013 workplace accident; (2) Plaintiff met her burden to establish that her neck condition was caused by the December 2013 workplace accident; and (3) the Full Commission did not err in concluding that Plaintiff’s refusal of Goodyear’s 16 July 2015 employment offer was unjustified. We remand this matter to the

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8. Plaintiff’s work restrictions required her to refrain from repetitive bending and twisting, and the pulling, pushing, or lifting of more than 15 pounds.

## IN RE C.C.

[260 N.C. App. 182 (2018)]

Industrial Commission to: (1) to consider whether the facts of this case support a conclusion that the employer or the insurance carrier should be estopped from denying coverage; and (2) to make specific findings addressing Plaintiff's wage-earning capacity between the dates of 13 May 2014 and 16 July 2015.

AFFIRMED IN PART; REMANDED IN PART.

Judges CALABRIA and ZACHARY concur.

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IN THE MATTER OF C.C., A.S.

No. COA18-54

Filed 3 July 2018

**Child Abuse, Dependency, and Neglect—neglect—adjudication—  
impairment or substantial risk—findings**

The trial court properly adjudicated a child as neglected where the child had been in stable voluntary placement outside of her parents' home for an extended period of time when the mother stated her intent to take the child from placement and move her out of state. Even though the trial court failed to make an ultimate finding that the child suffered an impairment or was at substantial risk of impairment as the result of her mother's actions, the evidence supported such a finding, as the trial court found that the father was incarcerated and the mother had issues related to substance abuse, mental health, unstable housing, and prostitution.

Appeal by respondent from orders entered 21 September 2017 and 2 October 2017 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 6 June 2018.

*Senior Assistant County Attorney Bettyna B. Abney for petitioner-appellee Durham County Department of Social Services.*

*Edward Eldred for respondent-appellant.*

*Melanie Stewart Cranford for guardian ad litem.*

DAVIS, Judge.

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In this case, we revisit the issue of whether a child can properly be adjudicated as neglected where she has been in a stable voluntary placement outside of her parents' home for an extended period of time prior to the filing of a neglect petition. C.C. ("Respondent") appeals from the trial court's orders adjudicating his daughter, C.C. ("Clarissa"),<sup>1</sup> as a neglected juvenile. Because we conclude the trial court properly determined that Clarissa was a neglected juvenile, we affirm.

**Factual and Procedural Background**

A.S. ("Anna")<sup>2</sup> gave birth to Clarissa on 7 December 2014. Respondent is Clarissa's putative father. Respondent was incarcerated at the Wake County Correctional Center at all times relevant to this case. When Clarissa was approximately six months old, she began living with Anna's foster mother ("Ms. L."). Clarissa continued living with Ms. L. until December 2016.

On 7 November 2016, Wake County Human Services ("WCHS") received a Child Protective Services report that Clarissa had been neglected while in Anna's care. The report included allegations of "substance abuse, mental health [issues], unstable housing, prostitution by the mother, . . . and inappropriate supervision, as [Clarissa] was left in a hotel (Days Inn) room by herself."

Clarissa's half-sister, A.S. ("Alice"),<sup>3</sup> was born on 12 December 2016. Around this time, Anna decided that Clarissa would live with Respondent's mother ("Ms. C.").

The case was transferred to the Durham County Department of Social Services ("DSS") on 30 January 2017 upon WCHS becoming aware that Anna and Alice had relocated to Durham. On 9 February 2017, Anna was accepted into the Cascade Treatment Program of Durham ("Cascade"), and she began living at Cascade along with Alice. During this time, Clarissa was living with Ms. C. and was allowed to visit Anna at Cascade on the weekends. During her stay at Cascade, Anna tested positive for illegal drugs on eleven out of thirteen drug tests.

On 17 April 2017, Cascade informed DSS of an incident in which Anna had been permitted to leave the agency "on a pass with an

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1. Pseudonyms and initials are used throughout this opinion for the privacy of the minor children and for ease of reading.

2. Anna is not a party to this appeal.

3. Respondent is not Alice's father.

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expected return of 8:00 p.m.” but had instead returned to the agency “around 1:45 a.m.[.] . . . long after curfew, and appeared intoxicated when she returned.” Anna was informed on 18 April 2017 that she would be discharged from Cascade “due to continuously testing positive for illegal substances.”

On 19 April 2017, a DSS employee informed Anna that due to her continued substance abuse it intended to file a petition seeking custody of her children and asked Anna who she would prefer to care for them. Anna requested that Clarissa and Alice be placed back with Ms. L. DSS subsequently approved a kinship assessment with Ms. L., and both children began living with her.

On 21 April 2017, Anna was discharged from Cascade. DSS filed a juvenile petition on 25 April 2017 alleging that Clarissa and Alice were neglected juveniles.

On 16 May 2017, Anna called Latisha Martin, a DSS social worker, and informed Martin that “she wanted to go to New Jersey, where she believed she could better access the services needed to sustain recovery.” She asked Martin if the children could be placed with Alice’s paternal grandmother (“Ms. B.”) in New Jersey. Martin replied that Ms. B.’s status as a relative would have to be confirmed through paternity testing and that a request under the Interstate Compact on the Placement of Children would need to be sent to New Jersey before the children could be placed with Ms. B.

On 17 May 2017, DSS sought an order for non-secure custody as to Clarissa and Alice and filed a supplemental petition for neglect, alleging that Anna was making arrangements to immediately remove the children from their placement with Ms. L. and take them to New Jersey. The supplemental petition stated that the children were “exposed to a substantial risk of serious physical injury or sexual abuse” because “the mother is threatening to remove the children [from Ms. L’s care] immediately.”

An adjudication hearing on DSS’s petition for neglect was held on 14 June 2017 before the Honorable Doretta L. Walker in Durham County District Court. Martin and Anna testified at the hearing. A dispositional hearing was held on 17 and 18 July 2017. On 21 September 2017, the trial court issued an order (the “Adjudication Order”) finding Clarissa to be a neglected juvenile. On 2 October 2017, the court entered a second order (the “Disposition Order”) determining that it was in Clarissa’s best interests to remain in the care of Ms. L. and continuing legal custody of

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Clarissa with DSS. Respondent file a timely notice of appeal as to both the Adjudication Order and the Disposition Order.<sup>4</sup>

**Analysis**

On appeal, Respondent contends that the trial court erred by adjudicating Clarissa to be neglected based on his argument that the court made no finding in the Adjudication Order that Clarissa was at a substantial risk of impairment and that the evidence would not have supported such a finding. At the outset, we note that it is undisputed by the parties that Respondent is unable to care for Clarissa because of his incarceration. For this reason, the parties devote their arguments to the issue of whether Clarissa meets the definition of a neglected juvenile based on the actions of Anna.

We review the trial court's order of adjudication to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Q.A.*, 245 N.C. App. 71, 73-74, 781 S.E.2d 862, 864 (2016) (citation, quotation marks, and brackets omitted). Findings of fact that are supported by competent evidence or are unchallenged by the appellant are binding on appeal. *In re A.B.*, 245 N.C. App. 35, 41, 781 S.E.2d 685, 689, *disc. review denied*, 369 N.C. 182, 793 S.E.2d 695 (2016). "Such findings are . . . conclusive on appeal even though the evidence might support a finding to the contrary." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). We review a trial court's conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

A neglected juvenile is defined as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker . . ." N.C. Gen. Stat. § 7B-101(15) (2017). "[T]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993).

However, even where the trial court makes no finding that a juvenile has been impaired or is at substantial risk of impairment there is no error if the evidence would support such a finding. *See In re H.N.D.*, 205 N.C. App. 702, 706, 696 S.E.2d 783, 786 (Wynn, J., dissenting) (holding

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4. Although the trial court also adjudicated Alice as a neglected juvenile, that portion of the court's ruling is not at issue in this appeal.

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that reversal was improper despite lack of ultimate finding where all the evidence supported adjudication of neglect based on substantial risk of impairment), *rev'd per curiam for reasons stated in dissent*, 364 N.C. 597, 704 S.E.2d 510 (2010); *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (“Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding.”); *Safriet*, 112 N.C. App. at 753, 436 S.E.2d at 902 (“Although the trial court failed to make any findings of fact concerning the detrimental effect of [parent’s] improper care on [child’s] physical, mental, or emotional well-being, all the evidence supports such a finding.”).

In the present case, the trial court made the following pertinent findings of fact:

5. [Respondent], putative father of [Clarissa], is a resident of North Carolina. He has lived in North Carolina for over six months prior to the filing of the petition. [Respondent] is incarcerated within the North Carolina Department of Corrections (“NCDOC”) system. . . . [Respondent] is at the Wake County Correctional Center in Raleigh, NC. [Respondent] was served the petitions in the following manner: personal service by Sheriff Deputy on June 14, 2017.

. . . .

8. The children are neglected in that they are not receiving proper care, supervision, or discipline from the parent, guardian, custodian, or caretaker and live in an environment injurious to their welfare with the parents.

9. On November 7, 2016, Wake County Human Services received a CPS report alleging neglect of the minor child, [Clarissa]. Concerns noted in the allegations included substance abuse, mental health, unstable housing, prostitution by the mother, [Anna], and inappropriate supervision, as [Clarissa] was left in a hotel (Days Inn) room by herself.

10. On December 16, 2016, another CPS report was made due to [Anna] giving birth to [Alice] on December 12, 2016. [Anna] tested positive for cocaine at the birth of [Alice]. [Anna] was not required by Wake County DSS to identify any safety resource for [Alice]; however, she

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continued to allow [Clarissa] to reside with [the] child's putative paternal grandmother, [Ms. C.]. Wake County DSS completed a kinship assessment on [Ms. C.]'s home on or about March 30, 2017[.]

11. [Clarissa] was living with [Ms. C.] when Durham DSS received the case. She brought [Clarissa] to Cascades [sic] on the weekends to stay with [Anna] and [Alice]. At some point in April 2017, when [Ms. C.] arrived to pick up [Clarissa], [Anna] chose to keep [Clarissa] with her. [Anna] later moved [Clarissa] to the care of [Anna]'s former foster mother, [Ms. L.]. [Clarissa] is two years old now. [Anna] had concerns about the quality of care [Clarissa] was receiving from [Ms. C.] while at Cascades [sic].

12. On December 21, 2016, a case decision of "services needed" for In-Home Services to address [Anna]'s substance abuse issues, parenting skills, and mental health needs was made. Durham County DSS received the case from Wake County DSS on January 30, 2017, stating that [Anna] and [Alice] had relocated to Durham County.

13. [Anna] has two older children . . . who both have been cared for by other individuals due to [Anna]'s instability. Both of these children have been out of [Anna]'s care since they were infants/ toddlers. . . . [Anna] is uncertain where the children are located at this time. Neither child was included on the Wake County CPS report that Durham County DSS received. Arrangements for her other children were made without DSS's intervention.

14. During [Anna]'s initial encounters with Durham DSS Social Worker Latisha Martin, [Anna] admitted that her substance abuse was a major barrier towards her stability and that she was open to entering a mother-child substance abuse treatment program. [Anna] has an extensive history of illegal drug use and instability. [Anna], along with [Alice], w[as] accepted and entered into Cascade Treatment Program of Durham on February 9, 2017. During [Anna]'s stay at Cascade, she tested positive for illegal drugs on 11 out of 13 drug tests. The substances included alcohol, cannabis, and various opiates. Cascade screened [Anna] on several occasions. [Anna] was enrolled in the residential substance abuse treatment

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program at Cascade, and remained there for about two and half [sic] months (February 9, 2017 until April 21, 2017). [Anna]’s suboxone/opiate maintenance treatment was outsourced to Hope Center for Advancement, while she was at Cascade. Two weeks prior to her discharge from Cascades [sic], [Anna] completed a mental health assessment at Turning Point. [Anna] did not return to Turning Point for any following mental health services as recommended. Currently, [Anna] is not receiving any mental health services or substance abuse treatment. [Anna] has not received suboxone/opiate maintenance treatment since her discharge from Cascades [sic].

15. On April 17, 2017, Durham DSS received a call from Cascade stating that [Anna] was allowed to leave the agency on a pass with an expected return of 8:00 p.m. [Anna] returned to the agency around 1:45 a.m. on April 18, 2017, long after curfew, and appeared intoxicated when she returned. [Anna] admitted that she was drinking alcohol and smoking marijuana after having transportation issues that evening. [Anna] was asked to leave the Cascade program, after this episode. Upon her return, the location of [Alice] was unknown to Cascade staff. [Anna] had left [Alice] with her niece . . . . When DSS later inquired about the whereabouts of [Clarissa], [Anna] informed DSS that [Clarissa] had been removed from the care of [Ms. C.] and returned to the care of [Ms. L.]. [Clarissa] has been in the care of [Ms. L.] since March 30, 2017.

16. On April 18, 2017, Durham County DSS attended a meeting at Cascade at which [Anna] was informed she would be discharged from the program due to failure to meet curfew on April 17, 2017. Cascade stated that they were willing to allow [Anna] the opportunity to remain at Cascade until April 21, 2017 as long as she followed the agency’s rules. However, she was discharged from Cascade on April 21, 2017 due to continuously testing positive for illegal substances.

17. On April 18, 2017, Durham DSS completed a kinship assessment with Ms. [L.], [Anna]’s former foster mother. Due to tensions between [Anna] and [Ms. C.] regarding [Clarissa]’s care, [Anna] requested that both children be

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placed in the care of [Ms. L.]. [Clarissa] had resided with [Ms. L.] for several months prior to staying with [Ms. C.]. [Anna] has not provided any day-to-day care or financial support for [Clarissa] on a continuous bas[i]s. The kinship home assessment was approved by Durham DSS.

18. On April 19, 2017, Durham DSS conducted a Child and Family Team meeting (“CFT”), which [Anna] attended. [Anna] admitted to Social Worker that she has a history of major trauma as a child. She admits that she has not properly addressed her mental health needs and substance abuse issues. She continues to use illegal substances and abuses alcohol.

19. [Anna]’s illegal substance abuse and lack of mental health treatment substantially impact her ability to parent her children.

20. After departing from Cascade, [Anna] lived for about a month in the Super Eight Motel on Capital Boulevard in Raleigh, and [Alice’s father] sometimes stayed with her there. On or about May 17, 2017, she then moved to an [“]extended stay motel” near Wake Forest Road in Raleigh, where she presently resides.

21. Since leaving Cascade, [Anna] worked at UPS for about a week or two. She quit that job because it was “too much” for her. For the most part, [Alice’s father] pays for her motel stay.

22. [Anna] has not enrolled in any parenting class. She is not engaged in any mental health treatment or substance abuse treatment program.

23. On May 17, 2017, Durham DSS filed a supplemental petition in this matter and requested nonsecure custody, as the result of a series of conversations that transpired between [Anna] and DSS staff members on May 16, 2017.

24. On May 17, 2017, [Anna] tested positive for marijuana and cocaine. [Alice’s father] tested positive for marijuana, cocaine and PCP. At this court date, [Anna] admitted that she would test positive for marijuana if she was drug tested that same day.

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25. [Anna] called Social Worker Martin. She indicated that she did not want to be charged with kidnapping, if she took her kids away from [Ms. L.]’s home. The social worker questioned her as to her plans, and [Anna] indicated that she wanted to go to New Jersey, where she believed she could better access the services needed to sustain recovery. [Anna] asked the social worker what would be involved in placing the kids with [Alice’s father]’s grandmother in New Jersey. The social worker stated that the grandmother’s status as a relative would first have to be confirmed through paternity testing for [Alice’s father]. The social worker then informed [Anna] that an ICPC request would have to be sent to New Jersey, so that the local social service agency could investigate the appropriateness of the grandmother’s home as a placement for the children.

Respondent challenges, in part, Finding No. 25 to the extent it implies that Anna wanted to move both children to New Jersey. He contends a social worker testified that Anna intended to take only Alice — and not Clarissa — to stay with relatives in New Jersey. The trial court’s remaining findings are unchallenged and are therefore binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.”). We need not resolve Respondent’s challenge to Finding No. 25 because for the reasons set out below, we are satisfied that — even construing Finding No. 25 in the manner advocated by Respondent — the trial court’s adjudication of neglect was proper.

Respondent’s primary argument is that not only did the trial court fail to make an ultimate finding that Clarissa was at substantial risk of impairment but also that the evidence of record would not have supported such a finding. Because Clarissa’s needs were met while living with Ms. L., he contends, Clarissa was not a neglected juvenile.

As this Court has previously stated, “[m]ost cases addressing the definition of neglect arise in the context of termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) . . . .” *In re K.J.D.*, 203 N.C. App. 653, 659, 692 S.E.2d 437, 442 (2010). “The factual situation presented in a termination of parental rights case is normally different from that presented by an adjudication case because in a termination case, the child has usually been removed from the parent’s home a substantial period of time before the filing of the petition for termination.” *Id.*

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Conversely, “[a]n adjudication case normally arises immediately following the child’s removal from the parent’s home.” *Id.*

The present appeal from an adjudication of neglect, however, presents the unusual situation where a child had not been living with either of her parents for an extended period of time prior to the filing of a juvenile petition and was doing well in her voluntary placement with a relative.

When, as in the present case, the child has been voluntarily removed from the home prior to the filing of the petition, the court should consider evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the [adjudication] proceeding.

*In re H.L.*, \_\_ N.C. App. \_\_, \_\_, 807 S.E.2d 685, 688 (2017) (internal citation and quotation marks omitted). “Essentially, the trial court must consider the conditions and the fitness of the parent to provide care at the time of the adjudication . . .” *Id.* at \_\_, 807 S.E.2d at 688 (citation and quotation marks omitted).

We find instructive our decision in *K.J.D.* In that case, the minor child had been living with his maternal grandmother for six months at the time DSS filed an initial petition alleging that his mother had neglected him. The initial petition was dismissed, and DSS filed a second petition nearly a year later. Approximately eighteen months after the child was initially placed with his grandmother, an adjudication hearing was held on the second petition. The trial court determined that even though the child was in a stable placement at the time the second petition was filed, he was nevertheless a neglected juvenile because his mother remained incapable of providing him with proper care and supervision. *K.J.D.*, 203 N.C. App. at 656, 692 S.E.2d at 441. On appeal, we affirmed the trial court’s adjudication of neglect, stating as follows:

The court’s findings of fact show that respondent-mother has been and remains unable to adequately provide for her child’s physical and economic needs. She has been unable to correct the conditions which led to the child’s kinship placement with the maternal grandmother. She continues to engage in assaultive behavior. She has not completed counseling to address her anger issues or sought treatment for her mental disorder. She does not have stable

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housing and she does not have a job. The trial court found that respondent-mother had failed “to correct the conditions that led to the removal of the minor child from [her] care for the past 16 to 18 months.” The Court also found that “the minor child would be at substantial risk of harm if either of his parents removed the child from [the] placement [with the maternal grandmother.]” We conclude these findings support a conclusion that the child is a neglected juvenile.

*Id.* at 661, 692 S.E.2d at 444.

We recently affirmed the holding of *K.J.D.* in *H.L.* In *H.L.*, the juvenile’s parents had problems with domestic violence and substance abuse and entered into a safety plan with DSS to place their daughter with her adult sister. Six months later, DSS filed a juvenile petition alleging that the child was neglected because while she was in her sister’s care both parents had submitted drug screens that tested positive for methamphetamines. *H.L.*, \_\_ N.C. App. at \_\_, 807 S.E.2d at 687. The trial court adjudicated the child to be a neglected juvenile and awarded guardianship to the child’s sister. *Id.* at \_\_, 807 S.E.2d at 687. This Court followed the framework set out in *K.J.D.* and held that the trial court’s ultimate finding that the child was neglected was supported because “respondent-father and [the child’s] mother had failed to remedy the conditions which required [the child] to be placed with her sister in a safety plan, such that they were unable to provide [the child] with proper care.” *Id.* at \_\_, 807 S.E.2d at 690.<sup>5</sup>

Here, Clarissa was voluntarily removed from Anna’s care and placed with Ms. L. while DSS was in the process of filing its original petition. The trial court’s unchallenged findings demonstrate that Clarissa was put in a kinship placement with Ms. L. because of the inability of both of Clarissa’s parents to care for her. Respondent was incarcerated, and Anna had issues related to “substance abuse, mental health, unstable housing, prostitution . . . , and inappropriate supervision . . . .”

Although the trial court failed to make an ultimate finding that Clarissa suffered an impairment or was at substantial risk of impairment

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5. In his brief, Respondent cites *In re B.P.*, \_\_ N.C. App. \_\_, 809 S.E.2d 914 (2018), in which this Court reversed an adjudication of neglect as to a child who was in a stable placement at the time DSS filed its neglect petition. However, the mother in *B.P.* had made significant improvements by the date of the adjudication hearing in correcting the conditions that led to the child’s removal from her care. *Id.* at \_\_, 809 S.E.2d at 919. The same cannot be said for Clarissa’s parents in the present case.

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as a result of Anna's actions, we are satisfied that the evidence here was sufficient to support a finding that Clarissa was at a substantial risk of impairment if she was returned to Anna's care. *See Padgett*, 156 N.C. App. at 648, 577 S.E.2d at 340 ("Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding.").

The trial court's findings make it abundantly clear that the conditions leading to the placement of Clarissa outside of the home had not been corrected. At the time of the adjudication hearing, Respondent was still incarcerated, and Anna had not (1) successfully engaged in substance abuse treatment; (2) enrolled in mental health treatment or parenting classes; or (3) obtained permanent employment. Thus, we conclude that the evidence supported the adjudication of Clarissa as a neglected juvenile under N.C. Gen. Stat. § 7B-101(15).

**Conclusion**

For the reasons stated above, we affirm the trial court's 21 September and 2 October 2017 orders.<sup>6</sup>

AFFIRMED.

Judges DILLON and INMAN concur.

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6. Although Respondent's notice of appeal indicated that he was also challenging the trial court's Disposition Order, his appellate brief does not contain any argument as to the validity of that order.

## IN RE D.S.

[260 N.C. App. 194 (2018)]

IN THE MATTER OF D.S.

No. COA18-104

Filed 3 July 2018

**1. Guardian and Ward—placement with non-relative—parent’s standing to appeal**

A father had standing to challenge the trial court’s failure to consider his child’s grandmother as a placement for out-of-home care because the father was asserting his own interest in having the court consider a relative before granting guardianship to a non-relative.

**2. Appeal and Error—preservation of issues—prior order vacated in prior appeal—new order appealed**

Where a father challenged the trial court’s failure to consider his child’s grandmother as placement for out-of-home care, the Court of Appeals rejected an argument that he waived review of the issue by not raising it in his prior appeal. In that prior appeal, the Court of Appeals vacated the prior order of the lower court, so the father could raise any argument on appeal from the new order.

**3. Jurisdiction—mootness—subsequent order—question not considered by trial court**

A subsequent guardianship order ceasing all visitation and contact between a child and her grandmother did not render moot a father’s argument that the trial court erred by failing to consider the grandmother as placement for out-of-home care before granting guardianship to a non-relative. Even though the facts relied upon to cease the grandmother’s visitation may have been relevant to the issue of guardianship, the question of whether the grandmother should have been given priority placement had not been considered by the trial court.

**4. Guardian and Ward—placement with non-relative—consideration of relatives—lack of findings or conclusions**

Where a father challenged the trial court’s failure to consider his child’s grandmother as a placement for out-of-home care, the Court of Appeals rejected an argument by Youth and Family Services that the record contained sufficient facts for the Court of Appeals to determine that the trial court properly considered placement with the grandmother but concluded it was not in the child’s best interest. The trial court made no findings or conclusions resolving this

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statutorily required question, and resolving the factual issue was beyond the scope of appellate review.

Appeal by respondent-father from order entered 2 November 2017 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 21 June 2018.

*Associate County Attorney Marc S. Gentile for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.*

*David A. Perez for respondent-appellant father.*

*Stephen M. Schoeberle for guardian ad litem.*

TYSON, Judge.

Respondent-father appeals from an order appointing M.G. (“Ms. Green”), an unrelated individual, as guardian for his minor child, D.S. (“Diana”). The trial court granted guardianship of Diana to a non-relative without explaining why it declined to give placement preference to Diana’s paternal grandmother. The court’s order is vacated and remanded for a new permanency planning hearing.

### I. Background

This case is before the Court for the second time. *In re D.S.*, \_\_\_ N.C. App. \_\_\_, 803 S.E.2d 873, 2017 WL 41269647 (2017) (unpublished). The Mecklenburg County Department of Social Services, Youth and Family Services Division (“YFS”), instituted the underlying juvenile case on 9 November 2015, when it obtained non-secure custody of Diana and filed a petition alleging she was a neglected and dependent juvenile. The trial court subsequently adjudicated Diana to be a neglected and dependent juvenile, continued custody of Diana with YFS, and set the primary permanent plan for Diana as reunification with a parent and the secondary permanent plan as guardianship.

In its 20 December 2016 permanency planning and guardianship order, the trial court set the sole permanent plan for Diana as guardianship and appointed Ms. Green as her guardian. Respondent appealed, and this Court concluded the trial court’s finding that Ms. Green has adequate resources to care appropriately for Diana was not supported by evidence at the permanency planning hearing. *Id.* This Court vacated the trial court’s order and remanded the case for further proceedings. *Id.*

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The trial court conducted a hearing after remand on 16 October 2017. The court limited the hearing to the issue of whether Ms. Green had the financial resources to appropriately care for Diana. On 2 November 2017, the court entered its order from the hearing on remand, which it titled “Supplementary Order.” The trial court incorporated, in its entirety, the 20 December 2016 permanency planning and guardianship order into the Supplementary Order. The court also made numerous findings of fact regarding Ms. Green’s financial ability to care for Diana, and made ultimate findings of fact that Ms. Green was financially able to appropriately care for Diana and understood the legal significance of being appointed as her guardian. The court ordered that the permanent plan for Diana would be guardianship, appointed Ms. Green to be Diana’s guardian, re-adopted a detailed visitation schedule for Diana’s parents and her paternal grandmother, and relieved the parents’ attorneys of further responsibility in this matter. Respondent filed timely notice of appeal from the trial court’s order.

**II. Jurisdiction**

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a) (2017).

**III. Issue**

Respondent asserts the trial court erred in appointing Ms. Green, a non-relative caretaker of Diana, as Diana’s guardian without first finding and showing that it properly considered and rejected her paternal grandmother as a placement. We agree.

**IV. Standard of Review**

Our review of a permanency planning order entered pursuant to N.C. Gen. Stat. § 7B-906.1 “is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law.” *In re J.H.*, 244 N.C. App. 255, 268, 780 S.E.2d 228, 238 (2015) (citation omitted).

**V. Analysis****A. N.C. Gen. Stat. § 7B-903(a1)**

In placing a juvenile in out-of-home care under this section, the court *shall* first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper

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care and supervision in a safe home, then the court *shall* order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile.

N.C. Gen. Stat. § 7B-903(a1) (2017) (emphasis supplied).

The use of the word “shall” in the statute shows the General Assembly’s intent for this requirement to be mandatory. *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (citation omitted). This Court has held that before placing a juvenile in an out-of-home placement at a permanency planning hearing, “the trial court was required to first consider placing [the juvenile] with [her relatives] unless it found that such a placement was not in [the juvenile’s] best interests.” *In re L.L.*, 172 N.C. App. 689, 703, 616 S.E.2d 392, 400 (2005) (construing earlier version of N.C. Gen. Stat. § 7B-903 and precursor statute to N.C. Gen. Stat. § 7B-906.1 (2017) governing permanency planning hearings, N.C. Gen. Stat. § 7B-906). “Failure to make specific findings of fact explaining the placement with the relative is not in the juvenile’s best interest will result in remand.” *In re A.S.*, 203 N.C. App. 140, 141-42, 693 S.E.2d 659, 660 (2010) (citation omitted).

*In re L.L.* incorporated the requirement set forth in N.C. Gen. Stat. § 7B-903, that a trial court must and “shall” first give consideration to placement of a juvenile with relatives, before it may order the juvenile into placement with a non-relative by a permanency planning order entered pursuant to N.C. Gen. Stat. § 7B-906 (2003).

Section 7B-906 has been repealed and replaced by N.C. Gen. Stat. § 7B-906.1. *See* 2013 N.C. Sess. Laws 129, §§ 25-26. Subsection 7B-906(d) addressed in *L.L.* contains identical mandatory language authorizing dispositions under N.C. Gen. Stat. § 7B-903, as that in current subsection 7B-906.1(i). *L.L.* is still controlling on this issue. *Compare* N.C. Gen. Stat. § 7B-906(d) (2003) *with* N.C. Gen. Stat. § 7B-906.1(i) (2017).

### B. YFS’ Arguments

YFS argues: (1) Respondent lacks standing to raise this argument; (2) Respondent waived the issue by not raising it in his prior appeal; (3) the issue is mooted due to a subsequent guardianship review order; and, (4) there are sufficient facts in the record to conclude that the trial court properly considered placement of Diana with her paternal grandmother and concluded such a placement was not in Diana’s best interest. We reject these arguments in turn.

## IN RE D.S.

[260 N.C. App. 194 (2018)]

1. *Standing*

[1] YFS cites to this Court's opinion in *In re C.A.D.*, \_\_\_ N.C. App. \_\_\_, 786 S.E.2d 745, 752 (2016) to support its argument that Respondent lacks standing to challenge the trial court's failure to properly consider Diana's own grandmother as a placement. In *C.A.D.*, the respondent-mother argued the trial court erred in ceasing reunification efforts in a permanency planning order, because her children should have been placed with the maternal grandparents. *Id.* at \_\_\_, 786 S.E.2d at 751. We rejected this argument, because the respondent-mother was not aggrieved by the trial court's conclusion, holding:

[T]he maternal grandparents have not appealed the trial court's permanency plan. They do not complain of the court's findings of fact or conclusions of law, and they do not complain they were injuriously affected by the trial court's decision to pursue adoption. Respondent cannot claim an injury on their behalf. Therefore, she has no standing to raise [this] claim.

*Id.* at \_\_\_, 786 S.E.2d at 752.

*In re C.A.D.* is distinguishable from the facts before us. In *C.A.D.*, the maternal grandparents were former custodians of at least one of the children in the juvenile case. *See id.* at \_\_\_, 786 S.E.2d at 747. The maternal grandparents in *C.A.D.* could have appealed from the order at issue, but did not. As a result, the respondent-mother lacked standing to present an argument directly affecting the rights of the maternal grandparents. Here, the paternal grandmother was never a party in the juvenile case and could not have independently appealed from the court's order to protect her own statutory rights. Respondent is not attempting to present a grievance of the paternal grandmother, as in *C.A.D.*, but rather asserting his own interest, as Diana's father, to have the trial court consider a potentially viable relative placement for his daughter before granting guardianship to a non-relative. Respondent has standing to raise this issue on appeal.

2. *Waiver*

[2] YFS' argument that Respondent waived this issue by not raising it in his prior appeal is similarly misplaced. When an order of a lower court is vacated, those portions that are vacated become void and of no effect. *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393-94, 545 S.E.2d 788, 793, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).

## IN RE D.S.

[260 N.C. App. 194 (2018)]

This Court did not limit its holding in the prior appeal to the trial court's guardianship award, but vacated the entire permanency planning order and remanded the case to the trial court for further proceedings. See *In re D.S.*, \_\_\_ N.C. App. \_\_\_, 803 S.E.2d 873. The 20 December 2016 permanency planning and guardianship order was void and of no effect. The posture of the case returned to YSF having custody of Diana under prior review and permanency planning orders. The court's new order re-incorporated the findings and conclusions of its 20 December 2016 permanency planning and guardianship order into its new "Supplementary Order," wherein it also made new findings and conclusions regarding Ms. Green's finances. The trial court's re-incorporation of the findings of fact and conclusions of law from the voided order, together with the combination of the two documents, constitutes a single new order that was entered after remand, from which Respondent could raise any argument on appeal. YFS' argument is overruled.

## 3. Mootness

[3] YFS and the guardian *ad litem* also argue a subsequent guardianship review order, entered 30 November 2017, which ceased all visitation and contact between Diana and the paternal grandmother makes Respondent's arguments moot. We disagree. This order does not moot the issue at hand.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Further, "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994) (internal quotation marks omitted).

*In re Stratton*, 159 N.C. App. 461, 463, 583 S.E.2d 323, 324, *appeal dismissed and disc. review denied*, 357 N.C. 506, 588 S.E.2d 472 (2003). Here, the question of whether the paternal grandmother should have been given priority placement consideration, as compelled by the statute, over a non-relative has never been addressed by the trial court and, if addressed, may have a practical effect on the case. Although the facts

## IN RE D.S.

[260 N.C. App. 194 (2018)]

relied upon by the trial court to cease the paternal grandmother's visitation may be relevant when this issue is before the trial court, that is an evidentiary question which does not render the matter moot. This matter is properly before us.

*4. Best Interest of the Juvenile*

**[4]** YFS asserts there are sufficient facts in the record for this Court to determine that the trial court properly considered placement of Diana with the paternal grandmother and concluded the placement was not in Diana's best interest. In support of this argument, YFS cites generally to prior hearings in the case, YFS' prior interactions with the paternal grandmother, and Diana's bond with Ms. Green.

Both YFS and Respondent are free to put on evidence before the trial court to resolve this issue. The trial court, however, has never made any findings of fact or conclusions of law resolving this issue, which it is statutorily required to do before placing Diana with a non-relative. *See In re A.S.*, 203 N.C. App. at 141-44, 693 S.E.2d at 660-62. YFS apparently expects this Court to resolve the factual issue in the first instance, which is beyond the scope of our appellate review. *See In re J.H.*, 244 N.C. App. at 268, 780 S.E.2d at 238.

Here, the trial court specifically found that both parents opposed appointing a non-relative guardian for Diana and wished for Diana to be placed with her paternal grandmother if the court determined she could not return to their home. Neither the "Supplementary Order" nor the incorporated 20 December 2016 permanency planning and guardianship order indicate the trial court considered the paternal grandmother as a placement option for Diana.

The trial court relied upon a pre-typed "check-the box" and "fill-in-the-blank" form for the 20 December 2016 permanency planning and guardianship order that does not appear to have a section addressing the statutory requirement that the court must give first consideration to relatives when ordering a juvenile into an out-of-home placement. The court's failure to make any findings or conclusions resolving these issues requires remand. *In re A.S.*, 203 N.C. App. at 141-44, 693 S.E.2d at 660-62.

The record before this Court suggests that more than eighteen months have passed since the last full permanency planning hearing in this case. The trial court's order is vacated and this matter is remanded for a new permanency planning hearing. *See* N.C. Gen. Stat. § 7B-906.1(a).

Because the order is vacated, it is unnecessary to address the merits of Respondent's second argument that the trial court erred by not stating

## IN RE L.V.

[260 N.C. App. 201 (2018)]

in its guardianship order what rights and responsibilities remained with respondent. *See* N.C. Gen. Stat. § 7B-906.1(e)(2).

VI. Conclusion

The trial court's order is vacated and this matter is remanded for a new permanency planning hearing in conformity with the mandates of the statute. *It is so ordered.*

VACATED AND REMANDED.

Judges DIETZ and MURPHY concur.

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IN THE MATTER OF L.V., A.V.

No. COA18-282

Filed 3 July 2018

**Termination of Parental Rights—no-merit brief—no issues on appeal—-independent review**

Where respondent-mother's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the mother did not file a pro se brief, the Court of Appeals dismissed the appeal without conducting an independent review of the record for issues not raised on appeal, as Rule 3.1(d) did not explicitly grant indigent parents the right to that review.

Appeal by Respondent-Mother from orders entered 5 December 2017 by Judge Beverly Scarlett in Chatham County District Court. Heard in the Court of Appeals 21 June 2018.

*W. Michael Spivey, for respondent-appellant mother.*

*Holcomb & Stephenson, LLP, by Deana K. Fleming, for petitioner-appellee Chatham County Department of Social Services.*

*Womble Bond Dickinson (US) LLP, by Jessica L. Gorczynski, for guardian ad litem.*

MURPHY, Judge.

## IN RE L.V.

[260 N.C. App. 201 (2018)]

Respondent appeals from orders terminating her parental rights to the minor children L.V. and A.V. On appeal, Respondent's appellate counsel filed a no-merit brief pursuant to Rule 3.1(d) stating that, after a conscientious and thorough review of the record on appeal, he has concluded that the record contains no issue of merit on which to base an argument for relief.<sup>1</sup> N.C. R. App. P. 3.1(d). Respondent's counsel complied with all requirements of Rule 3.1(d), and Respondent did not exercise her right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.<sup>2</sup>

DISMISSED.

Judges DIETZ and TYSON concur.

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1. In accordance with Rule 3.1(d), appellate counsel provided Respondent with copies of the no-merit brief, trial transcript, and record on appeal and advised her of her right to file a brief with this Court *pro se* on 11 April 2018.

2. "Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal." *State v. Velasquez-Cardenas*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 815 S.E.2d 9, 20 (2018) (Dillon, J., concurring).

## IN RE M.N.

[260 N.C. App. 203 (2018)]

IN THE MATTER OF M.N., K.S., A.N.

No. COA18-169

Filed 3 July 2018

**1. Child Abuse, Dependency, and Neglect—guardianship—grandparents—standing to appeal**

A child's grandparents had standing to appeal the trial court's orders adjudicating the child neglected and terminating the grandparents' guardianship even though the Department of Social Services (DSS) argued that a prior order granting them guardianship was deficient as a matter of law. DSS could not avoid review of this petition based on a non-jurisdictional error in the prior guardianship order from a previous neglect petition. Further, even assuming the prior guardianship order was void, an earlier order had granted custody to the grandparents, so they were parties with a right to appeal.

**2. Child Abuse, Dependency, and Neglect—neglect—harm or substantial risk of harm—sufficiency of finding**

The trial court erred, as conceded by the parties, in an adjudication of juvenile neglect by failing to make any findings showing harm or creation of a substantial risk of such harm, and the Court of Appeals reversed and remanded the issue where no evidence introduced at adjudication supported such findings.

Appeal by respondent maternal grandparents from orders entered 9 November 2017 and 14 November 2017 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 6 June 2018.

*Appellate Defender Glenn E. Gerding, by Assistant Appellate Defender Joseph Lee Gilliam, for Respondent-Appellant Jason Schindler.*

*Mercedes O. Chut, P.A., by Mercedes O. Chut, for Respondent-Appellant Shonna Schindler.*

*Richard Allen Penley for Petitioner-Appellee Onslow County Department of Social Services.*

*Matthew D. Wunsche for Appellee Guardian Ad Litem.*

## IN RE M.N.

[260 N.C. App. 203 (2018)]

INMAN, Judge.

Respondents Jason and Shonna Schindler (the “Schindlers”) appeal from orders on adjudication and disposition terminating their guardianship of their juvenile grandchild, K.S. (“Kaitlyn”).<sup>1</sup> After careful review, we reverse the orders in part and remand for further proceedings.

**I. FACTUAL AND PROCEDURAL HISTORY**

Kaitlyn was born in August 2007. Three months later, the Onslow County Department of Social Services (“DSS”) filed a juvenile petition alleging neglect by Kaitlyn’s parents (the “First Petition”). On 11 December 2007, the trial court adjudicated Kaitlyn neglected and abused, and granted physical custody of Kaitlyn to her maternal grandmother, respondent Shonna Schindler. Additional orders continuing Shonna Schindler’s physical custody of Kaitlyn were entered on 12 March and 18 April 2008. On 19 September 2008, and by orders entered 19 September 2008 and 4 February 2009, the trial court changed the plan to relative custody and granted primary legal and physical custody of Kaitlyn to the Schindlers (the “Custody Orders”). On 16 September 2009, the trial court entered an order (the “Guardianship Order”) granting the Schindlers legal guardianship of Kaitlyn and “ceas[ing] further reviews in this matter.”

Nothing further was filed concerning Kaitlyn until 12 July 2016, when DSS filed a second petition alleging neglect and dependency stemming from the Schindlers’ arrests on multiple drug-related charges (the “Second Petition”). The petition related not only to Kaitlyn, but also to two additional grandchildren.

Following several continuances, the trial court held an adjudication hearing on the Second Petition on 13 February 2017. DSS dismissed its allegation of dependency and sought adjudication only on the issue of neglect. Following the hearing, the trial court on 9 March 2017 entered an order adjudicating Kaitlyn and the other two grandchildren neglected and dependent, notwithstanding DSS’s dismissal of the latter ground. Eight months later, on 9 November 2017, the trial court entered a corrected adjudication order adjudicating the minors neglected and acknowledging the dismissal of the allegations of dependency. In

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1. A pseudonym is used to protect the identity of the juvenile and for ease of reading. See N.C. R. App. P. 3.1(b). No party appeals the orders on grounds pertaining to the two additional grandchildren named in the action, M.N. and A.N., and the only issues on appeal involve Kaitlyn. As a result, this opinion does not address any issues concerning the other grandchildren.

## IN RE M.N.

[260 N.C. App. 203 (2018)]

both the original and corrected orders, the trial court found that the Schindlers were granted guardianship of Kaitlyn as of 16 September 2009, the date of the Guardianship Order. While the trial court did find that the Schindlers had been arrested on drug-related charges, it failed to make any findings as to harm or risk of harm to Kaitlyn as a result of her guardians' alleged drug activities. Indeed, neither DSS nor a court-appointed Guardian Ad Litem ("GAL") introduced any evidence to support findings of harm or risk of harm to Kaitlyn, and the lone witness at the hearing did not testify regarding those factual issues.

Following a dispositional hearing on 7 June 2017, the trial court entered an order on 14 November 2017 terminating the Schindlers' guardianship of Kaitlyn. The Schindlers timely appealed both the corrected order on adjudication and the order on disposition.

**II. ANALYSIS**

[1] Both DSS and the GAL concede that the trial court's corrected adjudicatory order is deficient as a matter of law because it does not include the necessary factual findings of harm or a risk of harm to Kaitlyn resulting from the Schindlers' drug activities and arrests. However, DSS contends that the Schindlers are not parties to the action with right of appeal. Because "[s]tanding is jurisdictional in nature and . . . a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved[.]" *In re T.B.*, 200 N.C. App. 739, 742, 685 S.E.2d 529, 531-32 (2009) (citations and internal quotation marks omitted) (second alteration in original), we address this question first.

DSS asserts the Schindlers are without standing under two statutes: N.C. Gen. Stat. § 7B-401.1 (2017) and N.C. Gen. Stat. § 7B-1002(4) (2017). The first concerns who are or may be made parties to abuse, neglect, and dependency proceedings, while the latter limits which parties may appeal from orders rendered in those proceedings. Reviewing the relevant statutes and case law, we hold that the Schindlers have standing to appeal.

Section 7B-401.1 provides that the following persons are parties to abuse, neglect, and dependency proceedings:

(c) Guardian.—A person who is the child's court-appointed guardian of the person or general guardian when the petition is filed shall be a party. A person appointed as the child's guardian pursuant to G.S. 7B-600 shall automatically become a party but only if the court has found that the guardianship is the permanent plan for the juvenile.

## IN RE M.N.

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(d) Custodian.—A person who is the juvenile’s custodian, as defined in G.S. 7B-101(8), when the petition is filed shall be a party. A person to whom custody of the juvenile is awarded in the juvenile proceeding shall automatically become a party but only if the court has found that the custody arrangement is the permanent plan for the juvenile.

N.C. Gen. Stat. §§ 7B-401.1(c)-(d). Section 7B-1002 limits parties with the right to appeal to the juvenile if no GAL has been appointed, the GAL if previously appointed, DSS, the party that sought but failed to obtain a termination of parental rights, and “[a] parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.” N.C. Gen. Stat. §§ 7B-1002(1)-(5). DSS contends that the Guardianship Order is deficient as a matter of law and the Schindlers are therefore not guardians within the meaning of Section 7B-401.1(c). “[T]he effect of such failure[,]” DSS reasons, “means that the [Schindlers] have been merely caretakers since that time[,]” and caretakers are not parties with right of appeal under Section 7B-1002. This argument is unavailing.

First, dispositional orders are not subject to collateral attack in a subsequent action when the basis for voiding the prior order is non-jurisdictional. *See, e.g., In re Wheeler*, 87 N.C. App. 189, 193–94, 360 S.E.2d 458, 461 (1987) (prohibiting a party from collaterally attacking a prior order adjudicating a child abused and neglected and granting custody to a county department of social services on non-jurisdictional grounds on appeal from an order terminating parental rights). DSS, therefore, cannot avoid review of the Second Petition based on non-jurisdictional errors in orders entered on the First Petition. Because the Schindlers were guardians at the time the Second Petition was filed, they were parties to the action. N.C. Gen. Stat. § 7B-401.1(c) (“A person who is the child’s court-appointed guardian of the person or general guardian when the petition is filed shall be a party.”). As nonprevailing guardians, they have standing to appeal. N.C. Gen. Stat. § 7B-1002.

Second, assuming *arguendo* that the Guardianship Order is void, DSS does not contend that the earlier Custody Orders are invalid. Section 7B-101 defines “custodians” as “[t]he person . . . that has been awarded legal custody of a juvenile by a court[,]” N.C. Gen. Stat. § 7B-101 (2017), and the earlier Custody Orders made just such an award to the Schindlers. Because the last of the Custody Orders established that “the case plan of relative custody is the plan most likely to achieve permanence for [Kaitlyn,]” awarded the Schindlers legal custody, and changed the case plan to relative custody, the Schindlers were automatically

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rendered parties to the First Petition. N.C. Gen. Stat. § 7B-401.1(d).<sup>2</sup> Further, the Schindlers were custodians as defined by Section 7B-101(8) when the Second Petition was filed, and were therefore parties as of that time. N.C. Gen. Stat. § 7B-401.1(d). Finally, because non-prevailing custodians as defined in Section 7B-101 are parties with right to appeal, N.C. Gen. Stat. § 7B-1002(4), the Schindlers have standing to appeal the orders on adjudication and disposition.<sup>3</sup>

**[2]** We now turn to the merits. We review whether “the findings [made] support the conclusion[ ] of law” that Kaitlyn is neglected. *In re E.P.*, 183 N.C. App. 301, 307, 645 S.E.2d 772, 775 (2007). A trial court adjudicating a juvenile neglected must make sufficient findings “show[ing] . . . harm[ ] . . . or creat[ion of] a substantial risk of such harm[.]” *In re J.R.*, 243 N.C. App. 309, 314, 778 S.E.2d 441, 445 (2015), and, as conceded by all parties, the trial court in this case committed reversible error in failing to make any findings to that effect. Additionally, no evidence introduced at adjudication supports such findings, and reversal is therefore proper. *In re J.R.*, 243 N.C. App. at 315, 778 S.E.2d at 445 (reversing an adjudication of neglect where “neither the evidence nor the trial court’s findings are sufficient to establish [the juvenile] as a neglected juvenile”). As a result, and consistent with the relief requested by all parties on this issue, we reverse the adjudication order; since no party has appealed the adjudication of M.N. and A.N. as neglected, we limit our reversal to the portion of the order adjudicating Kaitlyn neglected.

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2. This statute was enacted in 2013, four years after the Custody and Guardianship Orders, and applied “to actions filed or pending on or after [1 October 2013].” 2013 N.C. Sess. Laws 129, § 41. No party contends that a final order had been entered on the First Petition and that the action was no longer pending at the time of Section 7B-401.1’s effective date or that the statute does not apply.

3. DSS posits in passing, and without arguing directly, that the trial court somehow lacked personal jurisdiction over the Schindlers at the time of the adjudication hearing on the Second Petition. This position has no merit. The trial court has jurisdiction “over the . . . guardian [or] custodian . . . of a juvenile who has been adjudicated abused, neglected, or dependent, provided [they] . . . ha[ve] (i) been properly served with summons pursuant to G.S. 7B-406, (ii) waived service of process, or (iii) automatically become a party pursuant to G.S. 7B-401.1(c) or (d).” N.C. Gen. Stat. § 7B-200(b) (2017). The Schindlers were both served with process and “bec[a]me automatic parties pursuant to N.C. Gen. Stat. §§ 7B-401.1(c) or (d)[.]” N.C. Gen. Stat. § 7B-200(b). Further, the Schindlers, with their attorneys, appeared at the adjudication hearing without objection on personal jurisdiction grounds; the issue was therefore waived. *In re K.J.L.*, 363 N.C. 343, 347, 677 S.E.2d 835, 837-38 (2009). With all three statutory grounds for personal jurisdiction met in this case, the phantom of a jurisdictional argument intimated by DSS is exactly that—spectral and without substance.

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“Since we reverse the adjudication order, the disposition order must also be reversed, obviating our need to address issues pertaining to it.” *In re S.C.R.*, 217 N.C. App. 168, 170, 718 S.E.2d 709, 713 (2011). Like the adjudication order, the disposition order is reversed in part, only as to Kaitlyn. In addition, we remand the case for further proceedings not inconsistent with this opinion.

**III. CONCLUSION**

As court-appointed guardians and persons awarded legal custody of Kaitlyn, the Schindlers are parties to this action pursuant to Section 7B-401.1 and have standing to bring this appeal pursuant to Section 7B-1002. Because the trial court failed to make sufficient findings of fact in its adjudication order to support the conclusion that Kaitlyn is a neglected juvenile, because no evidence was introduced to support those necessary findings of fact, and in light of the concessions by all parties on this issue, we reverse the adjudication order in part and the disposition order in part, with respect to the adjudication and disposition of Kaitlyn, and remand for further proceedings.

REVERSED IN PART AND REMANDED.

Judges DILLON and DAVIS concur.

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JULIE MICHELLE KOLCZAK (FORMERLY JOHNSON), PLAINTIFF  
v.  
ERIC FRANCIS JOHNSON, DEFENDANT

No. COA17-329

Filed 3 July 2018

**1. Contempt—civil contempt—findings of fact—temporary parenting agreement**

Sufficient competent evidence was presented to support the trial court’s findings of fact that a mother willfully violated communication and visitation provisions of a temporary parenting agreement. It is within the trial court’s purview to weigh the evidence, determine credibility, and make findings based upon the evidence; the court also properly exercised its discretion in determining the mother’s actions were willful.

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**2. Contempt—civil contempt—purge conditions—inclusion necessary**

A civil contempt order entered after a mother was found to have violated a temporary parenting agreement was deficient for failing to provide any method for how the mother could purge the contempt.

**3. Evidence—hearsay—custody modification—criminal activity—prejudice**

In a hearing to modify custody, evidence of criminal activity by the mother's husband gleaned from online sources and newspaper articles was not prejudicial, even if it constituted impermissible hearsay, given the extensive other similar evidence that was properly before the trial court.

**4. Child Custody and Support—modification—substantial change in circumstances—implicit conclusion of law**

Even though the trial court did not explicitly state its conclusion that a substantial change of circumstances affecting the welfare of the children occurred which would justify modifying child custody, the court's extensive findings of fact detailing negative changes in the family since the entry of the initial consent order, including but not limited to those resulting from the mother's remarriage to a man with a criminal history, were sufficient to support an order of modification. The findings and the trial court's conclusion that the father was entitled to a modification of custody made clear that the basis for modification was a substantial change in circumstances.

**5. Attorney Fees—custody modification—timeliness of objection—waiver**

In a proceeding to modify child custody, the mother waived her objection to the father's request for attorney fees where she waited until the third day of the hearing to object when the father submitted a supplemental affidavit in support of his initial request.

Judge TYSON concurring in the result only.

Appeal by plaintiff from order entered on or about 13 October 2016 by Judge Kimberly Best-Staton in District Court, Mecklenburg County. Heard in the Court of Appeals 18 October 2017.

*Lynna P. Moen, for plaintiff-appellant.*

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*Horack Talley Pharr & Lowndes, P.A., by K. Mitchell Kelling and Elizabeth J. James, for defendant-appellee.*

STROUD, Judge.

For the want of a nail the shoe was lost.  
For the want of a shoe the horse was lost.  
For the want of a horse the rider was lost.  
For the want of a rider the battle was lost.  
For the want of a battle the kingdom was lost,  
And all for the want of a horseshoe-nail.

Benjamin Franklin, *Poor Richard's Almanack* (1758). No kingdoms were lost in this appeal, but this opinion is much longer than it should have been for the want of a few words in the district court's order and in defendant-father's motions.

Courts strive mightily to rule based upon the substance of pleadings and orders, but there is a reason certain specific words are important in these legal documents as the correct words make orders clear and can avoid unnecessary appeals. The presence of "magic words" lets the appellate court know that the trial court has used the correct legal standard. While the absence of "magic words" may not result in reversal of an order, it often creates issues on appeal that could be easily avoided.

Plaintiff-mother appeals a trial court order modifying child custody, finding her in contempt, and ordering her to pay defendant-father's attorney fees. The trial court's order regarding civil contempt did not include any "purge" conditions, so we must reverse the portion of the order holding Mother in civil contempt. The trial court's order regarding modification of custody lacked a conclusion of law with the simple phrase "substantial change of circumstances," but after detailed analysis of the trial court's vague conclusion of Father's "entitlement" to modification in conjunction with the findings of fact, we affirm. Finally, the absence of the words "insufficient means to defray the expense of the suit" in defendant-father's motion for modification of custody created plaintiff-mother's entire argument on the award of attorney fees, but again, after a detailed analysis, we affirm because plaintiff-mother raised her objection to attorney fees too late. In summary, we affirm the order as to custody and attorney fees for the custody modification and reverse the order as to civil contempt.

**KOLCZAK v. JOHNSON**

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**I. Background**

Plaintiff (“Mother”) and defendant (“Father”) were married in 2000, had one child in 2003, one child in 2007, and separated in 2012. In 2012, Mother filed a complaint against Father seeking child custody, child support, post-separation support, alimony, attorney fees, equitable distribution, interim distribution, and an injunction to prevent Father from diverting funds. In February 2013, Father answered Mother’s complaint alleging marital misconduct and counterclaiming for child custody, child support, and equitable distribution. From these original pleadings, only child custody is at issue on appeal.

On 6 January 2014, the parties entered into a Consent Order regarding permanent child custody and child support with the parents sharing joint physical custody – Mother having the children Saturday through Wednesday and Father Wednesday through Saturday. On 16 April 2015, Father filed to modify custody alleging in part that Mother had married Mr. Dayton Kolczak in January of 2014.<sup>1</sup> The motion made detailed allegations about Mr. Kolczak’s criminal activities. For example, the motion alleges both Mother and Mr. Kolczak were arrested at Mother’s home when the children were present in January 2014 and the police had to call Father to pick up the children. Father sought sole legal and physical custody and also attorney fees.

In June of 2015, Father filed a motion for emergency custody and for a temporary parenting agreement (“TPA”) again based on the criminal conduct of Mr. Kolczak and the negative effects it was having on the children. On 24 July 2015, the trial court entered an order granting Father’s request for emergency custody and a separate order for a TPA which modified the custodial schedule; the orders did not suspend Mother’s visitation but imposed additional requirements:

2. Mother’s visitation with the children shall not be suspended but shall be conditioned upon the following:
  - a. Dayton Kolczak shall not be at Mother’s residence at any time when the minor children are present. The minor children shall have absolutely no contact with Dayton Kolczak at any time during their visitation

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1. The allegation does not include the actual date of Mother’s marriage to Mr. Kolczak. Even the trial court’s finding of fact in the order on appeal simply notes the marriage occurred in January of 2014. Mother also admits in her brief that she married Mr. Kolczak in January of 2014. The Consent Order did not include any finding of fact about Mother’s marital status other than her marriage to and separation from Father.

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with Mother. “No contact” shall include but is not limited to, no contact at Mother’s residence, in a car driven by Mother or anyone else, in a public place or anywhere else Dayton Kolczak might be present. Additionally, “no contact” shall be no communication via telephone, email, text or any other means of communicating with the boys.

....

d. Mother shall notify Father if she and/or Dayton Kolczak are arrested within 24 hours of said arrest.

e. There shall be no illegal drugs or drug paraphernalia at Mother’s home.

The orders also included provisions for no contact between the children and associates of Mr. Kolczak and required Mother to submit to a drug test and provide the results to Father’s attorney.

In September 2015, Mother moved for a temporary restraining order (“TRO”) and injunction against Father, alleging that he was contacting her “regularly and relentlessly” “for the purposes of harassment and interference.” On 6 November 2015, Father filed a motion for contempt alleging Mother’s failure to comply with both the Consent Order and the TPA order and requesting attorney fees. In October of 2015, the district court dismissed Mother’s motion for a TRO and injunction with prejudice. In November of 2016, Father filed a second motion for contempt alleging Mother’s additional failures to comply with both the Consent Order and the TPA order and again requesting attorney fees.

Over the course of five days in March and August of 2016, the trial court held a hearing on Father’s motion to modify custody, which included a request for attorney fees, and both of his motions for contempt. In October of 2016, the district court entered an order determining Mother was in civil contempt, awarding Father primary custody with Mother having secondary custody, and awarding Father attorney fees. Mother appeals only the October 2016 order.

## II. Civil Contempt

**[1]** Mother first challenges the district court’s determination that she was in contempt.

The standard of review for contempt proceedings is limited to determining whether there is competent

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evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.

*Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citations and quotation marks omitted).

**A. Findings of Fact**

Mother contests eleven of the trial court's findings of fact and argues "[t]here are four major categories in which the trial court found Michelle in civil contempt and they are as follows: (1) notification of arrests, (2) first right of refusal, (3) registration in camps without consulting father, and (4) allowing Dayton at Michelle's residence when the minor children are present." Mother has also challenged the contempt portion of the order based upon the lack of any purge conditions, and as discussed below, we are reversing the portion of the order finding her in contempt for that reason, but because the challenged findings of fact support the portions of the order addressing modification as well as contempt, we must address them.

**1. Notification of Arrests**

The TPA order required Mother to notify Father himself within 24 hours if she or her husband was arrested. Mother did not identify the findings of fact regarding notification of arrests as unsupported by the evidence. The relevant findings are:

25. Mother did not tell Father that her Husband, Dayton Kolczak, had been arrested within twenty-four (24) hours as required by the TPA Order.

26. Mother's attorney did notify Father's attorney but the requirement was for Mother to notify Father within twenty-four (24) hours and that did not happen.

Mother argues that though she "herself did not notify Father[,]" Father was in fact notified. Mother contends she took "reasonable measures to comply with" the order by her attorney notifying Father's attorney. Thus Mother is not contending she directly notified Father or that she was unable to directly notify Father, but rather that having her attorney contact Father's attorney was close enough and fulfilled the spirit of the order.

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The trial court was well within its discretion in finding that Mother willfully violated the Consent Order and TPA order by having Father's attorney notified instead of directly notifying Father. The Consent Order specifically provided that "[t]he parties shall use email or text as their primary method of communication and all communication should be respectful." The TPA order further required direct notification, which has the advantage of generally being faster. If there was an arrest on a weekend or holiday, contacting an attorney who must then contact another attorney who then must contact a client may substantially delay getting the message to Father. In addition, Mother's choice likely caused Father to incur additional attorney fees for a notification which could have been provided directly for free.

**2. Right of First Refusal**

The Consent Order contains a provision that "[t]he parties agree to offer the other parent the first right of refusal to watch the children if they are going to be more than 3 hours away before leaving them with a third party." Mother argues that the evidence does not support these findings regarding right of first refusal:

11. In December 2014, Mother violated the right of first refusal when Mother did not let Father care for the children. The children stayed with someone else instead of the Father. No email was sent to the Father to see if he could care for the children.

12. Mother violated the right of first refusal when Mother left the children with Nicki St. Claire and did not let Father care for the children.

The parties presented extensive and contradictory evidence regarding Mother's allowing the children to stay with third parties without notifying Father in advance. Mother acknowledges that she had allowed the children to go on sleepovers and day trips without notifying Father, but contends that "allowing a child to have a sleepover and a daytrip is not competent evidence to find that [Mother] willfully failed to comply with the first right of refusal requirement." But Father argues on appeal that Mother did not testify she was at home during the sleepover with Ms. St. Claire; in other words, Mother was using the sleepover as a method of childcare. The trial court considered and weighed the evidence; we cannot reweigh it. Mother does not deny that the children had a sleepover and her intent in allowing that could be interpreted in different ways. Because there was sufficient evidence for the trial court's findings regarding the right of first refusal, they "are conclusive on appeal[.]" *Id.* at 64, 652 S.E.2d at 317.

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**3. Registration in Camp without Consulting Father**

The Consent Order contains a provision that the parties “cannot make plans or schedule activities for the children during the other parent’s designated time without the prior consent of the other parent.” Regarding Mother registering the children at camp without consulting Father, Mother argues these findings of fact are not supported by the evidence:

13. Mother registered the children for camp without consulting with Father first.

....

15. No option was given to Father to make-up the days that he missed.<sup>2</sup>

Mother does not contest finding of fact 14 which found that her decision to enroll the children in camp “resulted in Father not seeing the children for 18 – 21 days.”

Mother’s entire argument on the challenged findings regarding camp is that “Father testified that ‘[w]e talked about camps’ in April 2015. T. Vol. 2, pp. 168. The trial court erred in holding [Mother] in civil contempt when [Father’s] testimony was that they did talk about camps in April 2015.” Father correctly points out there was much testimony regarding the children’s camps and the parties’ communications about them. Father did say the phrase quoted by Mother—“[w]e talked about camps” – but talking about camps in general is very different than notification of specific camps and the time periods for them. The trial court again weighed the evidence, determined credibility, and made findings based upon the evidence.

**4. Mr. Kolczak’s Presence at Mother’s Residence**

The TPA order specifically ordered that Mr. “Kolczak shall not be at Mother’s residence at any time when the minor children are present.” Mother challenges these findings about Mr. Kolczak’s presence in violation of the TPA order:

16. On or about August 21, 2015, Dayton Kolczak was in the driveway of Mother’s home while the children were present despite the Order stating he was not to be at the home.

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2. The order mistakenly includes two findings of fact numbered as 15. Based upon Mother’s argument, this is the finding of fact 15 she challenges.

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. . . .

46. Despite Mother's agreement with Father that Mr. Kolczak would not have contact with the children, the children have been exposed to Mr. Kolczak and Mr. Kolczak has had contact with the children.

Mother argues that the evidence shows Father

drove the children to [Mother's] home as [Mr. Kolczak] was leaving the home and was in the driveway. T. Vol. 2, pp. 96. [Mother] had no control over when [Father] was bringing the children to her home. The children were never present at the residence when [Mr. Kolczak] was present, in fact according to [Father] they were in his vehicle the entire time that as [Mr. Kolczak] was leaving. T. Vol. 2, pp. 96.

But Mother herself testified:

Q: And can you please describe for the Court your recollection of that day when [Mr. Kolczak] was there?

A: Yes.

He was heading out for work, *[Father] had texted me that he was on the way with the boys* and [Mr. Kolczak] left the house, but forgot his eyeglasses and ran in to get 'em.

He was walking out the door when [Father] pulled up. So he stayed around the back and then came out the front.

(Emphasis added.)

Once again, Mother asks us to make a different interpretation of the evidence than the trial court. Based on Mother's own testimony, Mother knew that Father would arrive at any moment but did not ensure that her husband was away from the home before Father and the children arrived. The trial court could have found this incident to be an innocent lapse or it could find otherwise, as it did. Furthermore, the trial court was viewing this isolated incident in the context of criminal activity by both Mother and her husband as there were other findings regarding Mr. Kolczak not challenged on appeal:

40. Mr. Kolczak has a criminal history and past as well as run-ins with the police for the past year.

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41. Mr. Kolczak is associated with Jalen O'Shea Cureton (herein after "Mr. Cureton").

42. Mr. Cureton has been arrested and charged with a financial crime as a result of Father's financial information being stolen and/or utilized.

43. Currently, Mr. Kolczak is incarcerated upon information and belief in the State of Illinois for various felony offenses but the Court finds he has been arrested on various dates which the Court will not enumerate. In January 2014, Mr. Kolczak as well as Mother were arrested and charged with an offense. Father bailed Mother out of jail after Mother was arrested.

44. Father and Mother reached an agreement that the children would have no contact with Mr. Kolczak.

45. Mother's criminal charges were dismissed after she completed court-ordered directives.

....

47. Mr. Kolczak's companions, including his brother, Dustin Kolczak, and his friend, Matthew Roe, have had contact with the children.

48. Dustin Kolczak as well as Matthew Roe also have criminal records.

There was competent evidence upon which the trial court could find Mother allowed Mr. Kolczak to be present at the home when the children arrived.

**B. Willfulness**

The remaining challenged findings of fact are regarding willfulness and Mother's ability to comply with the Contempt Order and TPA order. Mother argues that any violations of the Content Order and TPA order were misunderstandings or simply out of her control.

Civil contempt is designed to coerce compliance with a court order, and a party's ability to satisfy that order is essential. Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. Willfulness constitutes: (1) an ability to comply with the court

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order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply.

*Id.* at 66, 652 S.E.2d at 318 (2007) (citations and quotation marks omitted).

We have determined the findings of fact upon which the trial court found Mother in willful contempt are supported by the evidence. Once again, Mother is asking this Court to adopt a different view of her credibility and actions than the district court, but the district court was within its discretion in determining Mother's actions to be in willful violation of the orders in that Mother had the ability to comply and intentionally chose not to do so. *See generally id.* This argument is overruled.

### C. Purge Conditions

[2] Mother argues that the "Civil Contempt Order should be vacated since the court failed to specify how [she] might purge herself of contempt." Although the order specifically concluded that Mother "is in civil contempt of Court" for the violations of the two orders, Mother is correct that the order has no purge conditions or punishment for the contempt<sup>3</sup>. Father agrees with Mother that the order is deficient since it has no purge conditions, but he disagrees on the relief. Father argues we should remand to the trial court for entry of purge conditions and cites *Lueallen v. Lueallen*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 790 S.E.2d 690, 708 (2016). But in *Lueallen*, the contempt was failure to pay child support, and the order had required the obligor to pay "an additional \$75.00 per month" to be applied to arrears, where the order had also required her to pay \$100.00 per month toward arrears, and the order set no ending date for the arrears payments. *Id.* at \_\_\_ n.9, 790 S.E.2d at 707 n.9. We determined "that the purge conditions in the order are impermissibly vague" and remanded for clarification. *Id.* at \_\_\_, 790 S.E.2d at 708-09. In *Lueallen*, the trial court had determined that the obligor owed past-due child support and the question was simply the correct amount and how that amount would be paid. *See generally id.*, \_\_\_ N.C. App. \_\_\_, 790 S.E.2d at 690.

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3. Although Father specifically asked for Mother to be held in civil contempt, not criminal, and the trial court found Mother in civil contempt, this situation may be better suited for criminal contempt. But neither party has addressed the possibility of criminal contempt, and we will not address this potential issue.

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But in this case, the contempt is primarily based upon communication and visitation provisions of the orders, not child support. It is not apparent from the order how an appropriate civil contempt purge condition could “coerce the defendant to comply with a court order” as opposed to punishing her for a past violation. *Wellons v. White*, 229 N.C. App. 164, 181, 748 S.E.2d 709, 722 (2013). And here the trial court did not order vague purge conditions; it ordered none at all.

We believe this case is more similar to *Wellons* than *Lueallen*. Compare *Lueallen*, \_\_\_ N.C. App. \_\_\_, 790 S.E.2d 690; *Wellons*, 229 N.C. App. 164, 748 S.E.2d 709. In *Wellons*, the Court addressed a father’s denial of the grandparent’s visitation privileges established by a prior order. See *Wellons*, 229 N.C. App. at 165, 748 S.E.2d at 711. In *Wellons*, the trial court held the father in civil contempt for denial of visitation and ordered that he comply with the terms of the prior orders as a purge condition, but this Court reversed the contempt order:

In the instant case, the district court erred by failing to provide Mr. White a method to purge his contempt.

On 5 July 2012, the district court declared Mr. White to be in direct and wilful [sic] civil contempt of the prior Orders of the Court. It suspended Mr. White’s arrest based on the following condition: Defendant can purge his contempt by fully complying with the terms of the 30 March 2012 Interim Order, the prior Orders of 28 December 2007 and 27 July 2010, and this Order. The order did not establish a date after which Mr. White’s contempt was purged or provide any other means for Mr. White to purge the contempt.

We have previously reversed similar contempt orders. For instance, in *Cox* a contempt order stated the defendant could purge her contempt by not:

placing either of the minor children in a stressful situation or a situation detrimental to their welfare. Specifically, the defendant is ordered not to punish either of the minor children in any manner that is stressful, abusive, or detrimental to that child.

There, we reversed because the trial court failed to clearly specify what the defendant can and cannot do to the minor children in order to purge herself of the civil contempt.

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Similarly, in *Scott* a contempt order stated:

Defendant may postpone his imprisonment indefinitely by (1) enrolling in a Controlled Anger Program approved by this Court on or before August 1, 2001 and thereafter successfully completing the Program; (2) by not interfering with the Plaintiff's custody of the minor children and (3) by not threatening, abusing, harassing or interfering with the Plaintiff or the Plaintiff's custody of the minor children.

There, although we indicated the requirement to attend a Controlled Anger Program may comport with the ability of civil [violators] to purge themselves, we reversed because the other two requirements were impermissibly vague.

In the case at hand, the district court did not clearly specify what Mr. White can and cannot do to purge himself of contempt. Although the district court referenced previous orders containing specific provisions, it did not: (i) establish when Mr. White's compliance purged his contempt; or (ii) provide any other method for Mr. White to purge his contempt. We will not allow the district court to hold Mr. White indefinitely in contempt. Consequently, we reverse the portion of the 5 July 2012 order holding Mr. White in civil contempt.

*Id.* at 182–83, 748 S.E.2d 709, 722–23 (2013) (citations, quotation marks, ellipses, and brackets omitted). We therefore reverse the conclusion of law and decree provision holding Mother in civil contempt, specifically conclusion of law 4 and paragraph 1 of the decree.

### III. Modification of Custody

Mother raises two issues regarding the modification of custody.

#### A. Hearsay Evidence

**[3]** Mother contends the trial court erred in modifying custody because some of the critical findings of fact supporting modification were erroneously based upon hearsay. Mother argues that during the hearing, Father's counsel introduced evidence from online searches and a newspaper article regarding Mr. Kolczak's criminal record and activities. Mother contends she objected to the evidence, but the trial court overruled the objection and thus "erred relying on hearsay as a basis to change custody." (Original in all caps.).

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The competency, admissibility, and sufficiency of the evidence is a matter for the trial court to determine. We review the trial court's exclusion of documentary evidence under the hearsay rule for abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.

*In re Lucks*, 369 N.C. 222, 228, 794 S.E.2d 501, 506 (2016) (citations and quotation marks omitted).

Mother's husband, his criminal activities, and the risk to the children from exposure to him and his associates were primary concerns in this hearing, since the motion for modification was based in part upon Mother's failure to comply with the prior orders which required her not to have the children in Mr. Kolczak's presence. Father was not the only one to testify about Mr. Kolczak's crimes. For example, the first witness was Detective Kevin Jones, in the Financial Crimes Unit of the Charlotte/Mecklenburg Police Department. Detective Jones testified about his investigation of Father's report of "credit card accounts being opened or account takeovers as we call them, where his existing accounts had been compromised." This investigation revealed a connection between a man identified as Mr. Kolczak and Mr. Jaylin Curatan, the individual making purchases at a Best Buy store with Father's Best Buy account. Detective Jones discovered the relationship between Mr. Kolczak and Mr. Curatan because "Mr. Kolczak was actually arrested on September 1st, 2015, and Mr. Curatan was with him at the time."

In the TPA order, the district court found that Mr. Kolczak had been "arrested on May 15, 2015 for (1) felony possession of Schedule I Controlled Substance; (2) felony possession of cocaine; (3) resisting public officer; and (4) possession/manufacturing false identification." The district court further found in the TPA order that "[i]n addition to these arrests, Mr. Kolczak was arrested in Cabarrus County in August 2014, in Wake County in January 2015 and Dalton, Georgia in April 2015." Thus, even assuming arguendo the specific evidence Mother challenges regarding her husband's criminal activity was hearsay, it was not prejudicial considering the extensive other similar evidence before the trial court. *See Williams v. Williams*, 91 N.C. App. 469, 473, 372 S.E.2d 310, 312 (1988) ("While we agree that the testimony has characteristics of hearsay under the North Carolina Rules of Evidence, we hold that its admission was not prejudicial. The admission of incompetent testimony will not be held prejudicial when its import is abundantly established

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by other competent testimony, or the testimony is merely cumulative or corroborative. Because both plaintiff and defendant presented a considerable amount of conflicting evidence regarding the alleged sexual abuse, we conclude that the admission of this testimony was not prejudicial.” (citations and quotation marks omitted)). This argument is overruled.

**B. Modification of Custody**

**[4]** Mother next contends the “trial court erred in modifying custody with-out finding a change in circumstances.” (Original in all caps.) In her brief Mother contends that if we “exclude” the findings of fact regarding her husband’s criminal history, there are no findings of fact regarding a change of circumstances as required for a modification of custody because “remarriage alone is not a change of circumstances.” Mother argues “the trial court failed to articulate any substantial change in circumstances since entry of the original orders” and how any changes affect the welfare of the children.

Father’s brief seems to recognize that the order included no explicit conclusion of a substantial change in circumstances affecting the best interests of the children. Father argues “[f]indings of fact numbers 86 through 89 are, despite their label, actually conclusions of law in that the trial court exercised its judgment and/or applied legal principles to the specific facts of the immediate case.” These findings provide:

86. Mother is not able to sever[] ties with Mr. Kolczak.

87. It is necessary to ensure the children’s safety to award Father primary custody.

88. Father is entitled to a modification of the January 6, 2014 Consent Order.

89. Father is a fit and proper person to have the care, custody and control of the minor children and it is in the best interests of the minor children for Father to have their care, custody and control.

Findings 86 and 87 are findings of fact, not conclusions of law, but Findings 88 and 89 are conclusions of law. “The labels ‘findings of fact’ and ‘conclusions of law’ employed by the trial court in a written order do not determine the nature of our review.” *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012).

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A trial court's determination that there has been a substantial change of circumstances affecting the best interest of the children is a conclusion of law:

With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

*Shipman v. Shipman*, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003). Furthermore, "[w]e review conclusions of law *de novo*." *In re B.S.O.*, 234 N.C. App. 706, 708, 760 S.E.2d 59, 62 (2014).

We have already determined that the findings of fact Mother challenged above, including those regarding Mr. Kolczak's criminal history, are supported by competent evidence, so we must now consider if those findings support the trial court's conclusion of law that "Father is entitled to a modification of the" prior order. *See generally Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. Mother is correct that the order includes no specific conclusion of law – whether phrased as a finding of fact or as a conclusion of law – that there had been a substantial change of circumstances affecting the welfare of the children which justifies modification of custody. But finding 88 is a conclusion that "Father is entitled to a modification" of custody, and Father could only be "entitled" if the trial court concluded there has been a substantial change of circumstances affecting the welfare of the children. *See generally id.* Mother does not argue finding 88 could logically have any other meaning.

In the extensive findings of fact, the trial court detailed the substantial changes since entry of the Consent Order, including the effect these changes had on the children's welfare. Along with many of the findings we have already discussed regarding the contempt portion of the order, the order then addressed Mother's marriage to Mr. Kolczak within the same month as the Consent Order. The findings went on to note Mr. Kolczak's criminal history and "run-ins with the police for the past year."

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The order notes that some of his criminal associates, Mr. Cureton, Mr. Roe, and his brother Dustin, also had criminal records, and the children were exposed to them as well. The district court found specifically that at the time of the hearing “Mr. Kolczak is incarcerated upon information and belief in the State of Illinois for various felony offenses[.]” The district court then noted Mr. Kolczak had “various” other arrests, including one in January where both he and Mother were arrested, and Father bailed Mother out of jail. The district court then noted that Mother and Father had agreed that the children would have no contact with Mr. Kolczak, but Mr. Kolczak had contact with the children despite that agreement.

The district court also made findings about both parents’ participation in the children’s educational, spiritual, and medical needs, noting that both parents had been involved. The district court also found that outside of the contempt issues, the parents worked “well together[.]” although sometimes Father’s text messages were “condescending and critical[.]” and Mother failed to keep Father as well-informed as she should. The district court found that Mother and Mr. Kolczak had signed a Separation Agreement in December 2015, but Mother still remained in contact with him while incarcerated; mother had taken the children to see Mr. Kolczak’s grandmother; and though Mother had adequate warning and opportunity to ensure her children were not around Mr. Kolczak, she had not done so.

It is apparent from the findings of fact that the trial court determined that Mother’s marriage to a convicted felon, the arrest of Mother and Mr. Kolczak in the home when the children were present, exposure to Mr. Kolczak and his criminal associates, Mother’s refusal to ensure that Mr. Kolczak had no contact with the children, and Mother’s continuing relationship with him, despite claiming to be separated, were substantial changes since entry of the Consent Order. The criminal activity endangered the children. At the time of entry of the Consent Order, Mother had not informed Father she planned to marry Mr. Kolczak, had not been arrested, and had never violated an order regarding custody or visitation.

Mothers seeks to compare this case to *Davis v. Davis*, but in that case, “the trial court did not conclude that there was a substantial change in circumstances, let alone that those changes affected the welfare of the children. Actually, the trial court found just the opposite as to defendant’s motion and was silent as to plaintiff’s motion.” 229 N.C. App. 494, 504, 748 S.E.2d 594, 601–02 (2013). Nor did the *Davis* findings of fact make the reason for the modification “self-evident” but rather

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noted the issue for concern arose from an “isolated incident.” *Id.* at 504, 748 S.E.2d at 602.

This case is more similar to those where the order was affirmed because it found facts which show the substantial change of circumstances and how that change has affected the children, even though the order did not use exactly the right phrases. *See, e.g., Carlton v. Carlton*, 145 N.C. App. 252, 549 S.E.2d 916, *rev’d per curiam*, 354 N.C. 561, 557 S.E.2d 529 (2001). In *Carlton*, our Supreme Court reversed based upon the dissent. *See Carlton*, 354 N.C. 561, 557 S.E.2d 529. In *Carlton*, the trial court had awarded the father primary custody after it modified a joint custody order with of alternating weeks with each parent after the mother had absconded with the child for about two months, and the father had moved to Hawaii. *See Carlton*, 145 N.C. App. at 252-54, 549 S.E.2d at 917-18. The trial court did not specifically conclude there had been a substantial change in circumstances affecting welfare of the minor child, and the majority of this Court vacated and remanded the case to the trial court based upon the lack of the specific conclusion of law of a substantial “change of circumstances affecting the well-being” of the child. *Id.* at 259-60, 549 S.E.2d at 921-22.<sup>4</sup> The dissenting judge, with whom the Supreme Court agreed, *see Carlton*, 354 N.C. 561, 557 S.E.2d 529, would have affirmed the order, since the extensive and detailed findings clarified the reasons for the change and the effect upon the child, stating that “I decline to read the order appealed from so narrowly as to disregard the incorporated findings, or to constrain the trial court to use certain and specific ‘buzz’ words or phrases beyond that included in the order.” *Id.* at 261-63, 549 S.E.2d at 924 (Tyson, J., dissenting). The Supreme Court did not find it necessary to remand to the trial court for additional findings or conclusions of law but agreed with the dissent that the basis for the modification of custody was clear from the detailed findings of fact. *See Carlton*, 354 N.C. 561, 557 S.E.2d 529.

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4. The concurring judge pointed out the obvious change created by the father's move to Hawaii: “The majority correctly states that a mere change in residency is not enough to constitute a substantial change of circumstances. However, on these facts I believe that the defendant has shown more than a mere change in residency. The record reveals that the trial court's original order called for the child to alternate her residence between parents at the end of every week. The court later altered this arrangement to every two weeks. However, even the most well-to-do individuals could not sustain this arrangement given that the defendant's new residence is more than 4,000 miles from Catawba County, North Carolina. The travel expenses alone for a transcontinental transfer every two weeks would be beyond the means of most people. This case presents a situation where the original order is not functional.” *Carlton*, 145 N.C. App. at 260-61, 549 S.E.2d at 922 (Eagles, Chief J., concurring).

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While Mother is correct in her argument that “remarriage alone” is not necessarily a change of circumstances supporting a modification of custody, remarriage can be an important factor supporting a justification for modification. Here, the district court did not modify custody based on “remarriage alone” but on the fact that the remarriage was to a convicted felon who brought criminal activity and criminal associates into Mother’s home and into the presence of the children. Mother’s marriage to Mr. Kolczak caused substantial negative changes to the lives of the children, including Mother’s arrest and exposure to criminals which resulted in a court order for no contact with Mr. Kolczak that Mother violated. Therefore, we conclude the trial court did not err in concluding that Father was entitled to modification of the custody order. This argument is overruled.

**IV. Attorney Fees for Modification of Custody**

[5] Mother’s last argument is that “the court erred in awarding attorney fees.” We first note that the order on appeal set forth two separate sections of findings of fact for attorney fees, one for the contempt motions and one for the modification of custody. Mother does not challenge any of the findings of fact related to the fees for the contempt motions. Mother limits her argument regarding the award of attorney fees to the fees for modification of custody motion only. For example, Mother challenges only one finding of fact, No. 91, in the section for fees for modification of custody which states, “Father is acting in good faith in bringing this Motion. Father does have some means to defray the cost of his legal expenses but it does not appear that he has the ability to defray all of the costs considering the care and provisions made for the children.” Mother also challenges only one paragraph of the decree, No. 21, which addresses specifically attorney fees for the motion for modification of custody. Therefore, we conclude Mother has not challenged the attorney fees in relation to the contempt motion so we will not address that award of fees.

Mother’s only substantive argument regarding the award of attorney fees is that the district court erred in awarding attorney fees because Father’s motion for modification of custody “failed to allege that he has insufficient means to defray his expense of the suit.” Father’s motion requested that “Mother be ordered to pay Father’s costs and fees, including reasonable attorney’s fees” in its prayer for relief. Mother first objected to an award of attorney fees based upon the lack of detail in the motion to modify custody during the portion of the hearing held on 2 August 2016. Mother did not cite to the trial court any case requiring specificity in a motion for attorney fees nor does she cite such a case

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on appeal. Father argued to the trial court that Mother had waived her objection to the sufficiency of the request for attorney fees since she had not raised it earlier:

There was in-depth testimony in March about this issue. We put on all the evidence about his inability to pay. That he was acting in good faith.

Ms. Moen did not object then. All we're doing is filing a Supplemental Affidavit . . . and the evidence has been presented.

The district court overruled Mother's objection because she failed to object to the attorney fees based upon lack of specificity in the motion earlier in the hearing.

In *Byrd v. Byrd*, the plaintiff argued that the trial court erred by awarding attorney fees to the defendant in a child support case because the "defendant's Answer and Counterclaim does not make the required allegations or pray for the appropriate relief[.]" 62 N.C. App. 438, 442-43, 303 S.E.2d 205, 209 (1983). But the defendant had offered evidence on attorney fees at the hearing, and thus this Court determined,

[W]hen issues not raised in the pleadings are tried by the express or implied consent of the parties, North Carolina allows for the pleadings to be amended to conform to the evidence. Where a party offers evidence at trial which introduces a new issue and there is no objection by the opposing party, the opposing party is viewed as having consented to the admission of the evidence and the pleadings are deemed amended to include the new issue.

Here, the required allegations and pleadings were not made in defendant's answer and counterclaim. However, it was found from the evidence at the hearing that the defendant was acting in good faith, that she had insufficient means to defray the expense of the suit and that plaintiff had refused a request to furnish adequate support at the time the action was instituted. These findings are supported by evidence in the record which was introduced at the hearing without objection by plaintiff. Since plaintiff did not object to the admission of this evidence, the pleadings are deemed to be amended to conform to the evidence and the trial court's award of attorney's fees was therefore proper.

*Id.* (citations omitted).

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This case differs from *Byrd* because Father did ask for attorney fees, *contrast id.*, although without specificity in the pleading. Here, also different, Mother did object, but her objection came late in the hearing. Father testified regarding his request for attorney fees and submitted his first attorney fee affidavit on 29 March 2016. Mother did not raise her objection until 2 August 2016, the third day of the hearing, when Husband was submitting a supplemental attorney fee affidavit. We express no opinion on whether Husband's motion for attorney fees was required to be more detailed since we need not reach that issue, but Mother waived any objection to the sufficiency of Father's motion requesting attorney fees by failing to object earlier. *See generally id.*

## V. Conclusion

We affirm the order for modification of custody and the award of attorney fees for modification of custody. We also affirm the award of attorney fees for contempt because Mother did not challenge this portion of the award of attorney fees on appeal. We affirm the findings of fact regarding Mother's willful violations of the prior orders, but because the trial court did not set any purge conditions, we reverse the trial court's determination of civil contempt, specifically conclusion of law 4 and paragraph 1 of the decree.

AFFIRMED in part, REVERSED in part.

Judge HUNTER concurs.

Judge TYSON concurs in the result only.

**McDANIEL v. SAINTSING**

[260 N.C. App. 229 (2018)]

JAMES MARK McDANIEL, JR., PLAINTIFF

v.

BYRON L. SAINTSING AND SMITH DEBNAM NARRON DRAKE  
SAINTSING & MYERS, LLP, DEFENDANTS

No. COA18-88

Filed 3 July 2018

**Jurisdiction—subject matter—standing—right to assert claim—  
claim conveyed in settlement agreement**

In a case involving indebted business entities, the trial court properly granted defendants’ motion to dismiss plaintiff indebted business owner’s obstruction of justice claim for lack of subject matter jurisdiction. Plaintiff had transferred all of his assets, including any potential claims and causes of action, to the receiver as part of his settlement agreement and release, so, even assuming plaintiff had a colorable claim for obstruction of justice, that claim was conveyed to the receiver and thus plaintiff did not have a sufficient stake in the claim to establish standing.

Appeal by plaintiff from orders entered 11 July 2017 and 12 July 2017 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 6 June 2018.

*Douglas S. Harris for plaintiff-appellant.*

*Smith Debnam Narron Drake Saintsing & Myers, LLP, by Bettie Kelley Sousa, for defendants-appellees.*

ZACHARY, Judge.

Plaintiff James Mark McDaniel, Jr. appeals from the trial court’s orders setting aside entry of default and granting defendants’ Motion to Dismiss. Because plaintiff lacks standing, we affirm the trial court’s order dismissing this action.

**Background**

McDaniel co-owned several businesses with Dr. C. Richard Epes, including Southeastern Eye Center, Inc. (“SEC”) and several entities related thereto (“SEC Businesses”). According to McDaniel, “[a]s a part of that partnership, we had an agreement whereby we would each commit our wealth to make sure that the corporations continue to prosper.”

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However, the SEC Businesses had fallen into a great deal of debt by 2014.

Arthur Nivison and his family own several business entities (“Nivison Entities”) that by early 2014 were in the midst of litigation concerning debt owed to them by the SEC Businesses. Defendants Byron L. Saintsing and the law firm Smith Debnam Narron Drake Saintsing & Myers, LLP represented the Nivison Entities in the litigation. Nivison Entities sought additional security for the Nivison loans, including a secured interest in the collection of Andrew Wyeth paintings that Dr. Epes owned, valued at over \$20 million. McDaniel maintains that his business agreement with Dr. Epes “specifically included” the Andrew Wyeth paintings, whereby “Dr. Epes agreed to either borrow against or to sell paintings as necessary to protect our business[.]” According to McDaniel,

Arthur Nivison described his desire to have a secured interest in the Andrew Wyeth art collection (which if such a secured interest were granted would make the art collection unavailable for loans or sale and which would violate the agreement between Dr. Epes and me). I wrote back to Arthur Nivison (with a copy to Byron Saintsing) that under no circumstances were any Andrew Wyeth paintings to be secured and whatever we worked out would have to be worked out some other way.

McDaniel further contends that

Defendant Saintsing’s reaction to hearing the news that he could not have the Andrew Wyeth paintings as security for his clients was to personally prepare and file with the North Carolina Secretary of State a UCC-1 which gave Arthur Nivison a secured interest in the paintings - this was directly against my written instructions. At no time before the UCC-1 lien was filed with the North Carolina Secretary of State against the Andrew Wyeth paintings did Defendant Saintsing nor Defendant Smith Debnam Narron Drake Saintsing & Myers LLP nor anyone else obtain permission from Dr. Epes, from me or from anyone else to file a UCC-1, and therefore, the UCC-1 was legally unauthorized according to the UCC Rules, false and fraudulent and both defendants knew that said document was unauthorized false and fraudulent.

The UCC-1 amendment was filed 10 April 2014.

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On 27 April 2015, Chief Justice Mark Martin of the North Carolina Supreme Court designated thirteen cases pending against McDaniel, Dr. Richard Epes, and varied SEC Businesses as exceptional cases, and assigned the cases to the Honorable Louis Bledsoe, III for hearing. Judge Bledsoe appointed a receiver to manage the assets of the various SEC Businesses in litigation. The Receiver demanded, *inter alia*, “payment of money, return of assets and setting aside of various transactions” by McDaniel and his wife “on the grounds of corporate mismanagement, conflict of interest, insider and self-interested transactions, fraudulent transfers, [and] failure to maintain adequate capitalization[.]” In short, McDaniel was accused of engaging in various unlawful actions with intent to defraud and hinder creditors of the SEC Businesses. In order to resolve these and other claims, McDaniel and his wife entered into a Settlement Agreement and Release with the Receiver in August 2015, pursuant to the terms of which the Receiver agreed to release all claims against the McDaniels in exchange for the McDaniels’ relinquishment of any interest in virtually all of their non-exempt assets to the Receiver in satisfaction of the claims. The Settlement Agreement and Release provided for the transfer of all of the McDaniels’ “tangible personal property including all artwork, furniture including all antiques, art work, collectibles, coins, collectible papers, historic documents, glassware, and any and all other tangible items of value,” as well as “[a]ll judgments, rights, claims and causes of action including without limitation, any and all counterclaims or complaints currently pending in any ongoing action or proceeding and any and all unasserted or inchoate claims or causes of action” to the Receiver.

Notwithstanding McDaniel’s transfer of all “claims and causes of action” to the Receiver in settlement of various claims against him and his wife, McDaniel filed an obstruction of justice suit against defendants Saintsing and his firm on 10 April 2017 for their conduct relating to the April 2014 filing of the UCC-1 amendment. Default was entered as to McDaniel’s claim against defendants on 19 June 2017. Defendants filed a Motion to Dismiss McDaniel’s complaint for lack of subject-matter jurisdiction on 20 June 2017 and a Motion to Set Aside Entry of Default on 28 June 2017. The trial court granted defendants’ Motion to Set Aside Entry of Default on 11 July 2017. The next day, the trial court granted defendants’ Motion to Dismiss.

On appeal, McDaniel argues that the trial court erred (1) when it set aside the entry of default, and (2) when it granted defendants’ Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(3).

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**Discussion**

We first address whether the trial court erred when it granted defendants' Motion to Dismiss for lack of subject-matter jurisdiction. Defendants maintain that the trial court properly granted their Motion to Dismiss because McDaniel does not have standing in the instant case and that therefore, ". . . the trial court lacks subject matter jurisdiction. . . ."

At the hearing on defendants' Motion to Dismiss, the trial court summarized defendants' standing argument as twofold: "One is [McDaniel] never owned the artwork and, therefore, any claim related to a false filing, he never had anyway as an initial matter[.] And, then, secondly, if he had a claim, it was transferred by virtue of either the transfer of the artwork or by virtue of the language of the settlement agreement." We first address whether McDaniel lacks standing by virtue of the terms of the Settlement Agreement and Release to which he was a party.

Subject-matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001). "A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including on appeal." *Banks v. Hunter*, \_\_ N.C. App. \_\_, \_\_, 796 S.E.2d 361, 365 (2017) (citing *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961)). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

It is axiomatic that "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Cook v. Union Cty. Zoning Bd. of Adjustment*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (citation and quotation marks omitted). Standing "refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32, 31 L. Ed. 2d 636, 641 (1972)). Three elements must be satisfied in order for a plaintiff to establish standing:

- (1) 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

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*Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)).

In the instant case, as a part of his Settlement Agreement and Release with the Receiver, McDaniel agreed to “transfer and assign all of [his] assets, both disclosed and undisclosed, known and unknown, tangible and intangible,” including any and all “judgments, rights, claims and causes of action including, without limitation, any and all counterclaims or complaints currently pending in any ongoing action or proceeding and any and all unasserted or inchoate claims or causes of action” to the Receiver. Thus, even assuming, *arguendo*, that McDaniel had a colorable claim for obstruction of justice against defendants, the claim would have existed at the time of execution of the Settlement Agreement and Release, pursuant to the terms of which the right to assert that claim was conveyed to the Receiver. Accordingly, in that McDaniel’s potential legal claim is held by the Receiver, McDaniel does not have “a sufficient stake” in his obstruction of justice claim to establish standing in the instant matter. *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 51.

McDaniel also argues that the Settlement Agreement and Release has no bearing on his claim against defendants because defendants were neither parties to, nor beneficiaries of that contract. While it is true that defendants were neither parties to, nor beneficiaries of the Settlement Agreement and Release, this is irrelevant. The Settlement Agreement and Release does not affect defendants’ ability to defend against the obstruction of justice claim, but rather affects McDaniel’s ability to assert that claim from the outset in that the right to assert that claim became vested in the Receiver by operation of the Settlement Agreement and Release.

Accordingly, we conclude that the trial court properly granted defendants’ Motion to Dismiss because McDaniel lacks standing to assert the obstruction of justice claim at bar, as any such right to do so would belong not to McDaniel, but to the Receiver. Because there is no subject-matter jurisdiction in the instant case, we need not review the trial court’s order setting aside entry of default.

**Conclusion**

For the reasons contained herein, the trial court’s orders granting Defendants’ Motion to Dismiss and granting Defendants’ Motion to Set Aside Entry of Default are

**AFFIRMED.**

Judges ELMORE and HUNTER, JR. concur.

**SCHEINERT v. SCHEINERT**

[260 N.C. App. 234 (2018)]

JEANNE SOUTHALL SCHEINERT, PLAINTIFF

v.

HARRY STEVEN SCHEINERT, DEFENDANT

No. COA17-1227

Filed 3 July 2018

**Divorce—venue—removal of action—necessary findings**

The trial court's order transferring the parties' alimony proceeding to another county did not contain sufficient findings pursuant to N.C.G.S. § 50-3 regarding whether defendant resided outside of the presiding county at the time plaintiff filed her alimony action. The Court of Appeals rejected plaintiff's argument that section 50-3 did not apply unless there was some pending motion or trial date to be transferred after reviewing the plain language of the statute, which only required the existence of an ongoing alimony proceeding.

Appeal by plaintiff from judgment entered 25 May 2017 by Judge Robert M. Wilkins in Randolph County District Court. Heard in the Court of Appeals 18 April 2018.

*Lee M. Cecil for plaintiff-appellant.*

*Wyatt Early Harris Wheeler LLP, by Arlene M. Zipp, for defendant-appellee.*

DIETZ, Judge.

Plaintiff Jeanne Southall Scheinert appeals from an order transferring this alimony proceeding from Randolph County to Caswell County under N.C. Gen. Stat. § 50-3. As explained below, the trial court's order does not contain sufficient findings to support transfer under Section 50-3, although the record indicates that there is competent evidence to support a transfer. Accordingly, we vacate the trial court's order and remand for the trial court, in its discretion, to enter a new order on the existing record or conduct any further proceedings that the court deems necessary.

**Facts and Procedural History**

Plaintiff Jeanne Southall Scheinert and Defendant Harry Steven Scheinert married in March 1980 and separated in March 2003. At the

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time of separation, both parties lived in North Carolina. After the separation, Ms. Scheinert filed an action for alimony in Randolph County. The court ordered Mr. Scheinert to pay \$3,900.00 per month in alimony to Ms. Scheinert. Ms. Scheinert later moved from North Carolina to Indiana and Mr. Scheinert moved to Caswell County.

On 28 March 2017, Mr. Scheinert filed a motion to transfer the alimony proceeding from Randolph County to Caswell County under N.C. Gen. Stat. § 50-3. Section 50-3 provides that in “any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides.” N.C. Gen. Stat. § 50-3.

After a hearing, the trial court ordered that the matter be transferred to Caswell County under N.C. Gen. Stat. § 50-3. Ms. Scheinert timely appealed.

**Analysis****I. Sufficiency of the trial court’s findings of fact**

The central issue in this appeal is whether the trial court’s order contains sufficient findings to trigger the transfer provision in N.C. Gen. Stat. § 50-3. Our Supreme Court has held that this provision of Section 50-3 “is clearly mandatory. When the particular situation to which it applies is shown to obtain, the trial court has no choice but to order removal upon proper motion by the defendant.” *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 470 (1980).

The “particular situation” discussed in *Gardner*, as applicable to this alimony proceeding, is this: (1) at the time the alimony action was brought, both parties resided in North Carolina; (2) at that same time, the plaintiff resided in the county where the action was brought, but the defendant resided in a different county; and (3) the plaintiff has since moved out of the State. *See* N.C. Gen. Stat. § 50-3.

The parties agree that the first and third criteria are satisfied in this case and that the trial court’s order properly found facts supporting those criteria. But they dispute whether the trial court found that Mr. Scheinert resided outside of Randolph County when Ms. Scheinert brought the alimony action.

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To be sure, there was at least some competent evidence to support a finding that Mr. Scheinert did not reside in Randolph County when the alimony action commenced. In his verified answer and counterclaim, Mr. Scheinert disputed the allegation that he was a resident of Randolph County and averred that he was a resident of Guilford County. But the only finding addressing this issue in the court's order is the following: "On June 5, 2003, Defendant/Husband filed an Answer and Counterclaim alleging that he was a citizen and resident of Guilford County, North Carolina, as he had moved there recently after the date of separation."

This is not a fact-finding; it is merely a recitation of an allegation in Mr. Scheinert's answer. This Court has repeatedly held that a trial court cannot find facts by merely reciting allegations in the parties' pleadings; instead, the court must make a finding that the allegation is indeed a fact. *See, e.g., In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) ("As indicated by the word 'alleged,' the findings are not the 'ultimate facts' required by Rule 52(a) to support the trial court's conclusions of law, but rather are mere recitations of allegations."). Thus, we agree with Ms. Scheinert that the trial court's order does not contain sufficient findings to support its conclusion that N.C. Gen. Stat. § 50-3 required the case to be transferred to Caswell County. Accordingly, as explained below, we remand for further appropriate proceedings in the trial court's discretion.

## **II. Applicability of N.C. Gen. Stat. § 50-3 without a separate pending motion**

Ms. Scheinert also contends that remand is inappropriate because, as a matter of law, N.C. Gen. Stat. § 50-3 does not apply in this case. She argues that a defendant may invoke Section 50-3 only if there is some pending motion or trial date that will be transferred as part of the Section 50-3 order. We disagree.

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Wilkie v. City of Boiling Spring Lakes*, \_\_ N.C. \_\_, \_\_, 809 S.E.2d 853, 858 (2018). Section 50-3 provides that "the action may be removed upon motion of the defendant, for trial or *for any motion in the cause, either before or after judgment*, to the county in which the defendant resides." N.C. Gen. Stat. § 50-3 (emphasis added). The phrase "the action may be removed . . . for any motion in the cause" is forward-looking—its structure indicates that something will happen now for something to happen later. In other words, the statute requires the transfer so that a motion in the cause may be resolved in the new

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county at some future point. Nothing in the text of the statute requires that this underlying motion be pending in order to transfer the matter. All that is required is that there is an ongoing alimony proceeding that has not been finally resolved, and that the statutory criteria to transfer the matter are satisfied.

Indeed, at the hearing on this matter, Mr. Scheinert indicated that “[a]t some point, there will be a motion to modify or motion to terminate the alimony” and that he sought to transfer the action to Caswell County so that this future motion could be decided there. This is precisely what the text of the statute anticipates. Accordingly, we reject this argument.

**Conclusion**

We vacate and remand this matter for additional fact finding as described in this opinion. On remand, the trial court, in its discretion, may enter a new order based on the existing record, or conduct any additional proceedings that the court finds necessary.

VACATED AND REMANDED.

Judges DILLON and ARROWOOD concur.

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STATE OF NORTH CAROLINA  
v.  
WILLIAM OSCAR BAKER, DEFENDANT

No. COA17-1423

Filed 3 July 2018

**1. Contempt—criminal contempt—hearsay—corroborative evidence**

Two transcripts of testimony and statements by a trial witness were properly admitted in a contempt hearing for corroborative purposes and to explain the context of the proceeding in which the defendant made a gun gesture with his hand from his position in the courtroom audience to the witness who was then testifying in a trial against defendant’s cousin.

**2. Contempt—criminal contempt—willfulness**

The trial court’s findings that defendant made a gun gesture with his hand while looking directly at the witness testifying on the stand

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and that the conduct was intended to interrupt the testimony of the witness was supported by sufficient evidence, and in turn supported the conclusion that defendant's conduct was willful as required by the contempt statute.

**3. Attorney Fees—criminal contempt—civil judgment for attorney fees—notice and opportunity to be heard**

The trial court erred in entering judgment against defendant for attorney fees after finding him in criminal contempt where defendant was on notice but not given the opportunity to be heard as required by N.C.G.S. § 7A-455(b).

Appeal by defendant from order entered 6 June 2017 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 7 June 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kathryn H. Shields, for the State.*

*Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.*

BERGER, Judge.

On June 6, 2017, William Oscar Baker ("Defendant") was held in criminal contempt and sentenced to thirty days in jail in Robeson County Superior Court. Defendant appeals, arguing the trial court erred in holding him in criminal contempt and entering a civil judgment against him for reimbursement of court appointed attorney fees. We affirm the part of the trial court's order for criminal contempt, but vacate the portion assessing attorney's fees and remand for a new hearing on that issue.

**Factual and Procedural Background**

On September 28, 2016, the matter of *State v. McCormick* ("the trial") was heard in Robeson County Superior Court. Defendant, McCormick's cousin, was sitting in the audience. During the trial, an exchange occurred between a witness and Defendant that interrupted the State's direct examination of that witness. As a result of this exchange, the trial court held a separate hearing outside the presence of the jury to determine the cause of the interruption. The witness testified that Defendant was shaking his head and making a gun gesture at him while he was on the witness stand. After this hearing, the trial court ordered Defendant to show cause for the interruption.

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On June 6, 2017, the trial court held a hearing on the order to show cause. The State introduced two transcripts into evidence. The first transcript was a one-page excerpt taken from the testimony of the witness during the trial. The second transcript reflected the additional interview with the witness taken after testimony was over in the trial. Defendant objected to the transcripts as hearsay evidence, and the trial court stated that it would receive the transcripts into evidence for the limited purpose of “setting forth the circumstances in which the inquiry and the allegations of the contemptuous act [were] made.”

The State subsequently called three witnesses to testify to the events that occurred in the courtroom on September 28, 2016. The evidence presented tended to show that the witness became agitated on the stand and spoke to Defendant who was sitting in the courtroom behind the defense table. The witness told Defendant to stop shaking his head. Defendant also made a gun gesture with his hand and mouthed incomprehensible words towards the witness. The Assistant District Attorney was present during the trial, and testified to the following at the show cause hearing:

[Defendant] came in. I saw him move back to the second row, and then I could hear him talk—he was mumbling something. I couldn’t make out what. And then I noticed that the witness . . . was looking off in that direction, and it attracted my attention to [Defendant]. And I saw him nodding his head. It looked like he was mouthing something to the witness. Then I saw him make a gun with his hand and sort of put it up like this while he was gesturing and nodding his head towards [the witness].

. . . .

I saw him nodding his head and gesturing with his hands. And at one point—so [he] made what would look like a gun with his hand while he was—it looked like he was addressing [the witness] who was testifying.

Defendant also testified at the hearing, acknowledging that he sat in the second row during the trial on September 28, 2016. Defendant testified that he did not make any gesture, but stated that he was twisting his dreadlocks and talking to McCormick’s father during the trial. Defendant stated that he did not say anything to the witness during the trial.

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The trial court then made the following findings of fact:

During the trial of [*State v. McCormick*] the above Defendant was seen by a testifying state witness . . . to have made a hand gesture as to be pointing a gun to his head and shaking his head. Court was stopped and made inquir[ies] from multipl[e] witnesses concerning the incident and issued a show cause order.

A hearing was held this day and witnesses for the State and the defense testified as to the events of September 28, 2016.

Further, the trial court found that “[d]uring [the witness’] testimony, the Defendant did make the hand gesture as to be pointing a gun to his head, which disrupted the court proceedings.”

The trial court found Defendant to be in willful contempt of court, in violation of N.C. Gen. Stat. § 5A-11(a)(1) and sentenced Defendant to thirty days in jail. The trial court also entered a civil judgment for attorney’s fees and costs against Defendant. After judgment was entered, Defendant gave oral notice of appeal. Defendant filed a petition for writ of certiorari on January 24, 2018 seeking a belated appeal of the court’s imposition of the civil judgment.

Petition for Writ of Certiorari

Defendant seeks review of the civil judgment of attorney’s fees and costs, but acknowledges his appeal is untimely. Defendant relies on our recent case, *State v. Friend*, \_\_\_ N.C. App. \_\_\_, 809 S.E.2d 902 (2018), arguing he did not have an opportunity to be heard on the issue of attorney’s fees. We agree and grant his petition for certiorari.

“Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). It is well-established that without proper notice of appeal, this Court does not acquire jurisdiction to review the appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005).

In *State v. Friend*, the trial court did not inform the defendant of his right to be heard on the issue of attorney’s fees and costs. *Friend*, \_\_\_ N.C. App. at \_\_\_, 809 S.E.2d at 907. Accordingly, this Court granted the defendant’s untimely appeal as to the civil judgment. *Id.* Here, Defendant filed a belated appeal seven months after his hearing. However, as illustrated below, this case is procedurally similar to *State v. Friend*, and

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Defendant did not have the opportunity to be heard on the issue of payment of attorney's fees pursuant to N.C. Gen. Stat. § 7A-455(b). Based on the facts of the case *sub judice*, we grant Defendant's petition for writ of certiorari to review this issue on appeal under Rule 21(a). *See* N.C.R. App. P. 21(a).

Standard of Review

In contempt cases, the standard of review is “whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007). In contempt proceedings, “the trial judge’s findings of fact are conclusive when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency.” *State v. Coleman*, 188 N.C. App. 144, 148, 655 S.E.2d 450, 453 (2008) (citation, quotation marks, and ellipses omitted). Furthermore, the “trial court’s conclusions of law drawn from the findings of fact are reviewable de novo.” *Simon*, 185 N.C. App. at 250, 648 S.E.2d at 855 (citation and quotation marks omitted).

Analysis

[1] Defendant alleges the trial court erred because (1) there was no competent evidence to support the trial court’s judgment of criminal contempt due to the trial court admitting inadmissible hearsay, and (2) the trial court did not give Defendant notice and an opportunity to be heard on the order for attorney’s fees pursuant to N.C. Gen. Stat. § 7A-455(b). We address each argument in turn.

I. Criminal Contempt

Defendant contends the trial court erred because Defendant was found in criminal contempt based upon inadmissible hearsay. We disagree.

Section 5A-11(a)(1) states that criminal contempt is “[w]illful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.” N.C. Gen. Stat. § 5A-11(a)(1) (2017). “[A] show cause order in a criminal contempt proceeding is akin to an indictment, and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be borne by the State.” *Coleman*, 188 N.C. App. at 150, 655 S.E.2d at 453-54 (citation omitted).

Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of

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the matter asserted.” N.C. Gen. Stat. § 8C-801(c) (2017). “It is well-settled that a witness’ prior consistent statements are admissible to corroborate the witness’ sworn trial testimony.” *State v. McGraw*, 137 N.C. App. 726, 730, 529 S.E.2d 493, 497 (citation omitted), *disc. review denied*, 352 N.C. 360, 544 S.E.2d 554 (2000). Corroborative evidence “tends to strengthen, confirm, or make more certain the testimony of another witness.” *Id.* (citation and quotation marks omitted). “Corroborative evidence need not mirror the testimony it seeks to corroborate, and may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates.” *Id.* (citation omitted).

Here, the trial court allowed Exhibits 1 and 2 into evidence for the purpose of explaining the context of the proceeding where Defendant’s actions occurred and to corroborate the testimony of witnesses for the State. Exhibit 1 was used to illustrate the context in which the incident with Defendant arose, as well as to corroborate State testimony that the witness seemed agitated and distracted on the witness stand, while Exhibit 2 was used to corroborate the Assistant District Attorney’s testimony. The Assistant District Attorney testified Defendant was inaudibly speaking throughout the trial, facing the witness stand, and made a hand gesture in the form of a gun while the witness was testifying, causing the interruption. Because Exhibits 1 and 2 were used to corroborate the testimony of the State’s witnesses, and were not offered into evidence to prove that Defendant was speaking and making a gun gesture, the trial court did not err when admitting them into evidence.

**[2]** Defendant next contends that the trial court’s findings of fact did not support the conclusion that Defendant’s conduct was willful as required under N.C. Gen. Stat. § 5A-11(a)(1). “Willfulness” under Section 5A-11(a)(1) is defined as “an act done deliberately and purposefully in violation of law, and without authority, justification, or excuse.” *State v. Phair*, 193 N.C. App. 591, 594, 668 S.E.2d 110, 112 (2008) (citation and quotation marks omitted). Here, the trial court made the following finding:

The [c]ourt finds that . . . [Defendant’s] willful behavior was committed during the sitting of court intended to interrupt the proceedings in that [Defendant] used two fingers and his thumb in the shape of a gun pointing at his own head or hand while looking directly at the witness testifying on stand and mouthing something thereby interrupting the testimony of the witness, . . . resulting in the witness ceasing in testifying and challenging . . . the defendant’s action on the stand in front of the jury.

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This finding of fact supports the trial court's conclusion of law that Defendant willfully interrupted the proceedings beyond a reasonable doubt. We hold that the State presented sufficient evidence to support the trial court's findings of fact, and that those findings of fact, in turn, support the trial court's conclusions of law. Accordingly, the trial court did not err in holding Defendant in criminal contempt.

**II. Attorney's Fees**

**[3]** Defendant contends the trial court erred in entering a civil judgment against him for attorney's fees without first affording him an opportunity to be heard. We agree.

Section 7A-455(b) permits the trial court to enter a civil judgment against an indigent defendant following his conviction in the amount of the fees incurred by the defendant's appointed trial counsel. N.C. Gen. Stat. § 7A-455(b) (2017). However, this Court has required defendants be given notice and an opportunity to be heard prior to entry of a civil judgment for attorney's fees. *See State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005); *Friend*, \_\_\_ N.C. App. \_\_\_, 809 S.E.2d 902.

In *State v. Jacobs*, that defendant was notified of the attorney's fees assessed against him, but was not present when the amount of those fees was entered. *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317. This Court vacated the trial court's imposition of attorney's fees because the defendant was given notice of the court's intention to impose fees, but was never notified nor given the opportunity to be heard on the total amount of fees. *Id.* Similarly, in *Friend*, the trial court did not inform the defendant of his right to be heard on the issue of attorney's fees, and nothing in the record indicated that the defendant understood he had that right. *Friend*, \_\_\_ N.C. App. at \_\_\_, 809 S.E.2d at 907. This Court held that "[a]bsent a colloquy directly with the defendant on [the issue of attorney's fees], the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.*

Here, after Defendant was convicted of criminal contempt, the trial court asked Defendant's attorney how much time she spent on the case:

The Court: Do you know how much time again?

....

Counsel: I'm sorry. For his case, it would be about nine and a half hours, Your Honor.

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The Court: All right. I'm going to set the attorney fees at five hundred and seventy dollars (\$570). No. I'm just going to make a civil judgment. He's serving an active sentence. All right.

Because Defendant was present in the courtroom when the trial court imposed attorney's fees, Defendant was on notice of their imposition. *See Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317. However, the record indicates Defendant was not given the opportunity to be heard on the issue. Based upon the record and the transcript, there is no indication that the trial court addressed Defendant with regard to the issue of attorney's fees, or that Defendant knew he had the opportunity to address the trial court. Accordingly, Defendant was not given an opportunity to be heard as required by N.C. Gen. Stat § 7A-455(b), and we vacate the trial court's civil judgment for attorney's fees and remand to the trial court for further proceedings on this issue.

Conclusion

The trial court did not err in finding Defendant guilty of criminal contempt. We therefore affirm this portion of the trial court's order. However, the trial court failed to provide Defendant with an opportunity to be heard on the assessment of attorney's fees, and we vacate in part and remand on this issue.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges DIETZ and TYSON concur.

**STATE v. FORTE**

[260 N.C. App. 245 (2018)]

STATE OF NORTH CAROLINA

v.

JIMMY LEE FORTE, JR., DEFENDANT

No. COA17-669

Filed 3 July 2018

**1. Constitutional Law—right to counsel—forfeiture—obstructive conduct**

The trial court was not required to conduct an inquiry regarding waiver of counsel in a criminal proceeding pursuant to N.C.G.S. § 15A-1242 where defendant did not waive his right to counsel by seeking to represent himself, but forfeited his right to counsel by refusing to cooperate with more than one appointed counsel, constantly interrupting the trial court as it tried to explain defendant's right to counsel, continuing to be argumentative after being given an opportunity to discuss forfeiture with his lawyer outside of the courtroom, and obstructing court by refusing to hand discovery to his lawyer to submit to the trial court.

**2. Larceny—multiple counts—single transaction—entry of one judgment**

Seven of eight counts of larceny were vacated where all the property was stolen in a single transaction, constituting a single larceny.

**3. Indictment and Information—fatal variance—misdemeanor larceny—evidence at trial**

No fatal variance existed between the indictment charging defendant with larceny of a checkbook from a named individual and the evidence at trial showing that the checkbook belonged to that individual's auto salvage shop, where ample evidence indicated the victim had exclusive possession and control of the checkbook since he was the actual owner of the shop, he testified that the checkbook was his, his name was written on it, and it contained stubs of checks he had written.

**4. Indictment and Information—fatally defective—habitual felon status—essential elements—date of offense and corresponding date of conviction**

An indictment for habitual felon status was fatally defective because it alleged an offense date for a different crime than the one for which defendant was convicted in violation of N.C.G.S. § 14-7.3.

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Judge DIETZ concurring.

Appeal by Defendant from judgment entered 27 July 2016 by Judge Robert F. Johnson in Wilson County Superior Court. Heard in the Court of Appeals 22 March 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Jimmy Lee Forte, Jr. (“Defendant”) appeals from judgments entered upon jury verdicts finding him guilty of seven counts of larceny of a firearm, two counts of breaking and entering, two counts of larceny after breaking and entering, and one count each of breaking and entering a motor vehicle, misdemeanor larceny, and possession of firearm by a felon. The jury also found Defendant attained habitual felon status. On appeal, Defendant contends the trial court erred by (1) allowing Defendant to represent himself because he forfeited his right to counsel; (2) entering judgment for eight counts of felony larceny where all of the property was stolen in a single transaction; and (3) failing to dismiss the misdemeanor larceny charge where the evidence at trial failed to comport with the indictment. Defendant also contends the trial court lacked jurisdiction to sentence him as a habitual felon because the indictment was fatally defective. The State concedes the trial court erred in entering judgment for eight counts of felony larceny when the property was all stolen in a single transaction. Accordingly, we vacate seven of the eight counts of felony larceny and remand for sentencing on one count of felony larceny. We also conclude the habitual felon indictment is fatally defective and therefore vacate Defendant’s habitual felon status. We otherwise find no error.

### **I. Factual and Procedural History**

On 12 October 2015, a grand jury indicted Defendant on seven counts of larceny with a firearm, three counts of breaking and entering, three counts of larceny after breaking and entering, and one count each of breaking and entering a motor vehicle, misdemeanor larceny, felonious possession of burglary tools, possession of a firearm by a felon, habitual breaking and entering, and having attained habitual felon status.

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On 18 July 2016, Defendant's case came on for trial. Darryl Smith ("Smith") represented Defendant. Prior to motions *in limine*, the trial court addressed Smith's motion to withdraw due to "irreconcilable differences" with Defendant.

Smith explained his relationship with Defendant began with a "little difficulty" because Defendant wanted to go to trial within two to three weeks of Smith's appointment. Smith felt he and Defendant had a productive relationship initially, but the relationship deteriorated over discovery disputes. Additionally Smith stated:

[Defendant] has refused to answer questions about the case, frequently interrupts when we discuss the case. He argues about issues that are not in dispute between him and the State or as far as I know between him and me. States he will present evidence to the Court but refuses to tell me the substance of what it is he wants to present to the Court. . . .

He says that he has said a couple of times he doesn't believe what I have said about the law that applies to the case, has written numerous letters to District Court and Superior Court judges, couple of which have included, which I have not discussed with him, but that his handwriting and he can say no telling what he will do next time he sees me.

Defendant told the court Smith made false statements and had not received complete discovery. Defendant also stated if Smith did receive complete discovery, he had not shared it with him. After hearing from Smith and Defendant, the following occurred:

THE COURT: Listen to me. Time for you to stop talking.

[DEFENDANT]: He told me - -

THE COURT: Listen to me. Listen to me.

[DEFENDANT]: Yes, sir.

THE COURT: You have a right to be represented by an attorney in trial.

[DEFENDANT]: I haven't had my Motion For Discovery, sir. I keep saying that over 18 months. It's not a fair trial. It's irreparable prejudice.

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THE COURT: Sir, I have told you to stop talking.

You have a right to be represented by an attorney. If you cannot afford an attorney, the Court will appoint one. The Court has appointed an attorney for you. As a matter of fact, Mr. Smith is the third attorney.

[DEFENDANT]: He hasn't given my Motion For Discovery, sir.

THE COURT: Listen to me. Sir - -

[DEFENDANT]: He still ain't answering my question.

THE COURT: Sir, sir, you are making, you are making life tough for yourself.

[DEFENDANT]: Sir, I'm entitled to this. It's a copy right here, Defendant is entitled to the order. So if he got it, I don't have it. I'm entitled to have it, sir. That is prejudice to my case. I'm not going to go up here and - -

THE COURT: Mr. Smith, is this the kind of problems that you've experienced with this client?

MR. SMITH: Yes, sir.

[DEFENDANT]: I have a copy right here.

THE COURT: In other words, when you're trying to talk to him he interrupts? Is that what you've been experiencing?

MR. SMITH: Yes, sir.

THE COURT: He's not been cooperating with you as counsel?

MR. SMITH: That's correct.

THE COURT: Have you explained to him what waiver of counsel, waiver of his right to counsel is, in other words, voluntary waiver and he can go to trial and without the benefit of counsel - -

[DEFENDANT]: I didn't voluntary waiver.

THE COURT: - - by continuing to be uncooperative and continuing to interrupt? Have you talked to him about that kind of thing?

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The trial court directed Smith to take Defendant to a conference room and advise Defendant his behavior could result in Defendant “involuntarily waiving” or “forfeiting his right to counsel.” The trial court stated if Defendant is “forfeiting his right to counsel then he’s going to be on his own representing himself.” Defendant disagreed and stated, “I’m right in front of you and I’m saying I’m not forfeiting my right.” The trial court explained “that is a determination that I will make as the judge in the case and not one that he as the Defendant will make.” Defendant and Smith then exited the courtroom.

Upon their return, Smith summarized his conversation with Defendant for the trial court and stated “[t]here still might be a misunderstanding.” Smith also told the court Defendant did not want Smith to represent him, and asked the court to “appoint another lawyer to represent [Defendant].” Here, Defendant again interrupted the trial court, and the court stated:

Mr. Forte, one of the problems that you have is you keep interrupting. We follow a procedure in court and right now Mr. Smith is addressing the Court. I want to hear what he has to say. When I give you an opportunity I’ll give you an opportunity to speak but you need to understand something else. When I’m trying to speak to you or advise you or anything else, you need to listen and not be interrupting and not be trying to argue so right now - -

Defendant interrupted the trial court again.

Later, Defendant addressed the trial court regarding his problems with discovery and stated, “If I would have had a chance, if I may approach the bench, I can let you see all the discovery I have.” The trial court responded, “Why don’t you take the paper work that you have there, hand it to Mr. Smith and, Mr. Smith, you bring it up to me.” Defendant then stated, “I been having such a hard time just to get this part, sir, it’s like I’m kind of shell shocked. I hate to get this out of my hands without standing there watching. Can I stand up and see?” The trial court refused Defendant’s request. Defendant said, “I don’t feel comfortable putting paper work in his hands. I don’t feel comfortable.” Here, the trial court said, “You don’t feel comfortable handing it to your lawyer in the courtroom who’s less than 20 feet from me and have him bring it up to me on the bench.” Defendant then stated, “There you go, sir. . . . It’s been hard enough for me to get these copies that’s what being, you know, kind of my behavior, sir.” The trial court then concluded, “Well, I’ll be honest with you, Mr. Forte, it appears to me your behavior in the court,

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something as simple for you to hand it to your lawyer and have him hand it up, appears to me to be obstructive.”

Further into the hearing, the trial court tried to understand why Defendant had issues with his second and third counsel, and review with Defendant his right to counsel. The trial court stated, “Mr. Forte -- I want the record to reflect that Mr. Forte continuously interrupts the Court. He has for the last two hours, that Mr. Forte continuously refuses to listen to the questions and answer the questions as the Court is trying to go through his rights to counsel.”

Ultimately, the trial court stated:

This Court finds . . . the Defendant continuously refuses to cooperate fully with his lawyer, continues to be argumentative not only with his counsel but also with this Court. The Court finds that the Defendant’s actions are willful, that they are intentional and they are designed to obstruct and delay the orderly trial court proceedings. The Court finds that the Defendant has, therefore, forfeited his right to court-appointed counsel.

The trial court then appointed Smith to serve as Defendant’s standby counsel.

The State first called William Hitchcock (“Hitchcock”), a detective with the Wilson Police Department. On 16 January 2015, Hitchcock received a “break-in call.” Pursuant to this call, Hitchcock went to a single family residence at 4104 Little John Drive in Wilson, North Carolina. The break-in occurred at this residence where a window was broken, and there was missing property. Hitchcock spoke to the victim, Mrs. Winbourne (“Winbourne”) to “gauge” the items taken. Winbourne told Hitchcock, “There were several firearms stolen and several pieces of jewelry.” Detective Liggins (“Liggins”), another detective on the scene, surveyed the neighborhood with Hitchcock. Together they knocked on neighbor’s doors to look for witnesses. However, no one saw anything.

Hitchcock testified he normally visits pawn shops to look for stolen goods. Before Hitchcock could go to a pawn shop, and while he was still at the Winbourne’s residence, he received a phone call from his sergeant. Hitchcock’s sergeant informed him Defendant was riding a bike on Lake Wilson Road. Hitchcock then left the Winbourne’s residence and went to Lake Wilson Road where he found Defendant, and stopped him. Hitchcock told Defendant there had been a break-in in the area. Hitchcock asked Defendant if he could search him, and Defendant

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consented. Upon searching Defendant, Hitchcock found a “tool used to snip metal,” and a coin “with the initials “K.H.” engraved on it. These items were in Defendant’s pockets. The coin was a silver dollar.

Hitchcock believed the “K.H.” stood for Keith Hill (“Hill”). Hill was a victim in a Country Club break-in prior to 16 January 2015. Defendant told Hitchcock the coins belonged to his father. Because Hill’s missing coins closely matched the coin in Defendant’s possession, Hitchcock arrested Defendant for “possession of stolen goods and possession of burglary tools.” Hitchcock read Defendant his Miranda rights and transported Defendant to the Wilson Police Department. Also at the police department, Hitchcock called Mr. Hill and “had him describe some of the coins he had stolen which the coin we recovered from [Defendant] did match the description from his break-in.”

Hitchcock and Liggins later went to Defendant’s home. Hitchcock stated:

We had been advised that [Defendant] had been locked out of his house during the day and we thought if he had possibly been a suspect in the break-in on Little John [Drive] that the property would be somewhere either near his property or on his property outside, if he didn’t have a way to get into the house.

Upon arriving at Defendant’s residence, Hitchcock spoke to Defendant’s mother, Viola Forte (“Ms. Forte”). There, Hitchcock “asked her for consent to search the outside of her residence as well as any common areas in the residence.” Ms. Forte gave a written consent to the search. Hitchcock testified:

We didn’t go inside the house because we thought if you were locked out of the house there was no way he could have brought the property inside if he didn’t have a key. So we just searched the, we searched his yard, the front yard, the back yard as well as there was some paths off of Lake Wilson Road.

Hitchcock “was standing next to Detective Liggins when he found a pillowcase underneath the shed in the back yard which contained several pieces of property [they] believed to be stolen at the time.” This property included “two handguns, firearms, and jewelry.” The handguns appeared to be “Browning handguns,” which were “not the most common firearm that we typically have reported stolen[.]”

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Hitchcock was later able to “locate” a few of the owners of the property in the pillowcase. There was a “blue and silver some type of tennis bracelet that belonged to Nicole Neamer who had experienced a break-in recently in the Belle Meade subdivision.” Additionally, Hitchcock was “able to identify the firearms as some of the ones that were reported stolen from the Little John Drive incident that happened earlier that day.”

Later that day, Hitchcock received a phone call from Defendant’s father. As a result of that phone conversation, Hitchcock and Liggins returned to Defendant’s residence. Once there, Hitchcock and Liggins received verbal consent to search the attic. There was a lot of property in the attic, such as “jewelry, sunglasses, ammunition, [and a] shotgun[.]” Hitchcock and Liggins “seized” the property and returned to the police department.

The State next called Hill. Hill came home from vacation with his wife on 29 December 2014. He noticed the door inside his garage was ajar, and he entered the house. “And then when I went into the house, we went to the bedroom, I found several of the my wife’s dresser drawers open. I found several of my dresser drawers open. I found the nightstand drawer open. And there were pieces of jewelry laying on the floor.”

Additionally:

After we, I saw the dresser drawers opened, I looked and my wife has a little box that she keeps her jewelry in. That was gone. I then looked in my dresser drawer. I found - - I have a box that I keep my cuff links and some other items in. That was missing. I have several, right beside that box I had several \$2 bills and some silver certificate bills. They were missing.

Hill called the Wilson Police Department, who immediately responded and helped Hill search his house. Hill discovered he was missing a “mint condition silver dollar.” Hill knew the silver dollar was from the 1800’s, and it had his initials engraved on it. Hitchcock returned the silver dollar to Hill “on or about the 16<sup>th</sup> or 17<sup>th</sup> of January.”

The State next called Winbourne. Winbourne came home for lunch on 16 January 2015. She pulled her car into her garage and noticed her door inside the garage was ajar. As soon as she entered the kitchen through her garage, she saw broken glass on the floor from her back door. At that point, she screamed and “turned around and ran out of the house” and called 911. The police responded and checked the house to make sure it was safe for Winbourne to go inside.

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Winbourne testified she was missing a tennis bracelet after the break-in. She was also missing some silver dollars, some watches, and a “Tiffany key” pendant on a “long Tiffany necklace.” Winbourne later identified her stolen items at the police department on the same day as the break-in. The police told Winbourne her items were discovered at Defendant’s residence, which was not far from her home. Winbourne also identified the pillowcase containing her stolen items as hers.

The State next called Kenneth Alan Winbourne (“Mr. Winbourne”). On 16 January 2015, Mr. Winbourne was at work when he received a phone call from his wife. Mrs. Winbourne told him “somebody had threw a brick through the back glass on the door[.]” Mr. Winbourne immediately came home. When he arrived home, he could see his “house was in disarray.” Mr. Winbourne kept two handguns on the right side of his bed. The bedside drawer was “pulled out” and then “the first thing I done I turned around and looked at the dresser behind me is where I keep my dad’s guns and all those were gone and there was a shotgun in the corner and it was gone.” Mr. Winbourne was able to identify all his missing guns at the police office later that day.

The State next called Nicole Nemer (“Nemer”). On 11 January 2015, Nemer’s friend went to Nemer’s house to deliver some flowers. The friend discovered Nemer’s house had been broken into, and called the Wilson Police. Nemer arrived at her home approximately 40 minutes later. Nemer saw the window next to her back door had been broken, “so that they could get in to unlock my door.” Nemer kept her jewelry “lined up” in her walk-in closet. Nemer was missing her “grandmother’s sapphire and diamond ring, a gold necklace . . . [a] sapphire and diamond necklace, sapphire diamond bracelet and a couple of [her] larger more expensive pieces that were given as gifts[.]” She was also missing more than \$2,000 in cash. On 16 January 2015, Nemer identified her sapphire and diamond bracelet at the police station. The police found the bracelet in the “very bottom of the pillowcase.” She got her bracelet back that same day.

The State next called Glen Cox (“Cox”). Cox is employed by “[f]amily owned business, Cox Auto Salvage.” On or about 12 January 2015, Cox contacted Detective Mayo (“Mayo”) of the sheriff’s department to “let him know [Cox’s] truck had been broken into.” Cox had business papers inside his truck that “were shuffled around.” Cox testified at the time he “didn’t see anything missing but somebody had obviously been inside [his] truck.” Mayo encouraged Cox to file a police report. A few days later, Cox “needed to pay a customer” and realized his “company

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checkbook was missing.” Cox contacted Mayo. Mayo returned the checkbook to Cox, but Cox had already canceled the missing checks.

On cross, Cox testified Mayo called him and asked him if he was missing a checkbook. Mayo then brought the checkbook to Cox. Cox was able to identify the checkbook because “[i]t had stubs of checks that [he] had written[,]” and “[i]t had [his] name on it.”

The State next called Liggins, a police officer with the Town of Clayton. On 16 January 2015, Liggins was a detective with the Wilson Police Department. That day, Liggins, along with Hitchcock, responded to a break-in at 4104 Little John Drive. Liggins stayed at the scene for about 15 to 20 minutes. Hitchcock received a phone call from his sergeant, and as a result, Liggins accompanied Hitchcock to Lake Wilson Road. There, Liggins encountered Defendant, and stopped him. Liggins watched Hitchcock speak with Defendant. Liggins also watched Hitchcock get Defendant’s consent to a search. Liggins then saw Hitchcock arrest Defendant and take him into custody. At this time, Liggins was about five feet from Hitchcock and Defendant, and could hear everything. Defendant “had a coin on him that Detective Hitchcock told [Liggins] it was from a break-in that he was investigating as well as some type of tool.” Liggins accompanied Hitchcock and Defendant to the police station.

Liggins later went with Hitchcock to Defendant’s residence. There, Defendant’s mother gave Liggins and Hitchcock a written consent to search. During the search of the back yard, Liggins “noticed a piece of cloth hanging out from under the storage shed.” Liggins then “walked over and pulled it out which ended up being a pillowcase.” Liggins opened the pillowcase and found “firearms, handguns, as well as jewelry.” Liggins showed the items to Hitchcock. They returned to the police department.

At the police department, Liggins made sure Defendant understood his Miranda rights and, less than one hour later, Liggins took Defendant’s statement. Defendant gave his statement orally, and Liggins transcribed Defendant’s statement. Once Liggins finished writing Defendant’s statement, Liggins allowed Defendant to read his statement. Liggins gave Defendant the opportunity to add to or retract his statement. Defendant signed the statement after he read it. Liggins read Defendant’s statement for the jury:

About two weeks ago I was walking around the Country Club. I walked around for a few days. I noticed nobody was around the house . . . . The little garage door was

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open. I checked it and it was unlocked . . . . I went inside and got some men and women's jewelry and some coins . . . . I also got some \$2 bills. I spent the \$2 and some bills at the store on Elizabeth Road. I took some of the coins to a store on Airport Boulevard. The guy at the store on Airport bought about three of the coins and he gave me about \$15 per coin. My mom left this morning and I can't stay in the house when she is gone because I stole from her. I chose the house this morning because it is a low key area. I walked up to the house and rang the doorbell. . . . [N]obody. . . .

Came to the door . . . . I saw a pile of bricks and went and got one. I took the brick and smashed the back door. I went inside and grabbed the stuff. I got two pistols, some jewelry and a few coins . . . . I got a pillowcase and put the stuff in there and left and I was on foot. I walked back to my house. I stashed the stuff under the building in the back yard . . . . I used the money to buy crack . . . . I went behind the laundromat in the woods and smoked crack and then I headed back toward home. Then the police stopped me. The coin I had in my pocket was from the B&E in the Country Club . . . . I'm sorry for what I did and I need help. . . . I did this because I'm on drugs.

The State next called Sarah Sallenger Jones ("Jones"). Jones is an official record keeper and deputy clerk with the Wilson County Clerk's Office. The State handed Jones a file for defendant. The file contained the "Judgment and Commitment for Active Punishment Felony Charge" for breaking and/or entering. The form reflected Defendant committed breaking and/or entering on 27 July 2003, and was convicted of that offense on 8 March 2004. Defendant received "seven to nine months North Carolina D.O.C."

The State rested. Defendant moved to dismiss all the cases against him due to insufficient evidence. The trial court denied Defendant's motion. The trial court then asked Defendant if he planned to put on additional evidence. Defendant responded, "Yes, sir." The trial court advised Defendant of his rights regarding his testifying. The trial court gave Defendant an opportunity to discuss testifying with his stand-by counsel.

Defendant took the stand. On 16 January 2015, Defendant woke up, bathed, dressed, and made breakfast. Defendant's mother left home to go to work. Defendant took his breakfast outside and sat on the porch.

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A man named J.T. called Defendant and asked him if he had any “crack.” Defendant said he did, and J.T. told Defendant he was on his way to Defendant’s home. Defendant then finished his breakfast, threw away his trash, and smoked a cigarette. J.T. wanted to pay for the drugs with some property, but Defendant told him he needed cash. J.T. then “left, came back, got some drugs from me for piece.” J.T. paid Defendant with “a bracelet and two watches and three antique coins as well as \$30 in change to turn out to be \$15 in quarters and \$15 in nickel, dimes and pennies[.]” Defendant asked J.T.

A little while later, Defendant rode his bike across town and stopped at an antique coin shop. J.T. had previously sold a coin to Defendant, and Defendant visited that shop to learn the coin’s value. Defendant disagreed with the shop’s owner over the coin’s value. Defendant then rode his bike to Ward Boulevard and got a drink. After that, Defendant went to Southern Bank on Tarboro Street and exchanged \$15 dollars in quarters for dollars. Defendant next rode to his cousin’s house to smoke marijuana. He stayed there approximately 30 minutes. When Defendant left his cousin’s home, he went back across town on West Nash. He took a short cut through the Food Lion parking lot and came out on Lake Wilson Road to escape traffic.

Defendant saw a “detective car” as he came out of the parking lot. Sergeant Lamm and two unknown officers were in that car. Defendant noticed another “detective car” as he turned onto Lake Wilson Road. Hitchcock, Liggins, and another officer were in this second car. Defendant testified, “Detective Hitchcock got his window down like waving me down saying he needed to talk to me which I yelled back, you don’t need to talk to me and I don’t need to talk to you.” Hitchcock then pulled his car into the center lane. Everyone in Hitchcock’s car exited and approached Defendant on the sidewalk. The officers in the first “detective car” also stopped and approached Defendant.

Hitchcock asked Defendant where he was headed. Defendant responded, “sir, you don’t need to talk to me and I don’t need to talk to you. I said, I got my I.D. on me.” Hitchcock then told Defendant he would be under arrest if Defendant did not answer his questions. Defendant told Hitchcock he was going to his parents’ house. Hitchcock informed Defendant there had been a break-in on St. George Drive, and “one man ring, two men watches . . . one or two women watches, some women rings and a bracelet” were missing. Additionally, there was another break-in at 4104 Little John Drive where “\$2 bills, some coins, jewelry, two firearms from the dresser, a shotgun, and four more handguns” were stolen. Hitchcock stated he needed to search Defendant for weapons,

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and Defendant did not consent to the search. Hitchcock again said he needed to search for weapons. Since six officers were present, Defendant did not want to “resist.” Hitchcock searched Defendant and found a pair of wire cutters and a coin J.T. gave to Defendant in exchange for drugs. Hitchcock asked Defendant why he had wire cutters, and Defendant responded he used them to cut copper wire from an old A.C. unit in his parents’ backyard. Defendant also told Hitchcock he got the coin from his father.

Defendant testified:

I regret not telling him that I had bought it from the guy, J.T., but I really didn’t know the guy J.T. name. I only knew his number. And I feel like if I said I got it from J.T., J.T. could have simply denied it and he still would have believed I did these enterings because, as you discovered today, I have had a record.

Hitchcock handcuffed Defendant and informed Defendant he was being detained. Hitchcock then asked Defendant for his father’s cell phone number. Defendant complied. Hitchcock then went to Defendant’s parents’ house.

According to Defendant:

All three officers get out their unmarked car. One of the officers grabbed my bike which I immediately looked at when they grabbed my bike they was searching my parents’ yard when they were not home without my parents’ consent which then Detective Hitchcock then asked me my dad’s number again.

One officer put Defendant’s bike on the porch. That same officer opened Defendant’s parents’ fence. Before the officer entered the back yard, Hitchcock exited the car. Hitchcock yelled something toward that officer, but Defendant was unable to hear. Liggins and Hitchcock both entered Defendant’s car and drove to the police station. Sergeant Lamm and the three other officers stayed at Defendant’s home.

At the police station, Hitchcock questioned Defendant about the prior breaking and enterings. Defendant told Hitchcock, “I didn’t commit that crime.” Hitchcock gave Defendant a form explaining Defendant’s rights, and Defendant refused to sign the form. Defendant then heard Hitchcock whisper to Liggins, “see if I can go back to Forte’s parents’ house and speak with his mother[.]” Hitchcock left, and Detective Battle took Defendant to get fingerprinted and “booked.” Defendant

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then returned to the interview room where Hitchcock read Defendant his rights. Hitchcock told Defendant, “[W]e just got back to your parents’ house; that she gave us consent to search.” He also told Defendant, “[W]e found four firearms and a shotgun in plain view under the barn . . . [and] a pillowcase with two more handguns . . . [with] some jewelry and coins.” At this point, Defendant denied having knowledge about those items. Hitchcock then told Defendant if he did not know anything, then his parents would be charged. Defendant felt threatened and coerced, so he admitted to the crimes. Defendant testified:

He actually seen me break down stating that I didn’t do it the whole time but he still coerced me, come on, you did it; you did it, like, you know what I’m saying, so he’s coercing me through it, which he also during that coercion he actually, the only part he didn’t coerce me to I added the part about the crack.

Defendant rested. Defendant moved to dismiss all the charges at the close of the evidence based on the insufficiency of the evidence. The trial court denied Defendant’s motion to dismiss on all counts except for the charge of possession of burglary tools.

The jury returned unanimous verdicts of guilty of seven counts of larceny of a firearm; two counts of felony breaking or entering; two counts of larceny after breaking or entering; one count of possession of a firearm by a felon; one count of breaking or entering a motor vehicle; and one count of misdemeanor larceny. The jury also found Defendant not guilty of one count of felony breaking or entering and larceny after breaking or entering. Additionally, the jury found Defendant guilty of obtaining habitual felon status.

The trial court found Defendant had six prior sentencing points making him a prior record level III. The trial court sentenced Defendant to two consecutive terms of 15 days in the county jail for contempt of court. The trial court stated:

Now, with regard to case file 15-CRS-50200, the Defendant having been found guilty of felony breaking or entering, guilty of felony larceny after breaking or entering and guilty of the felony of larceny of a firearm . . . the Court consolidates those three counts for one judgment and it is the judgment of the Court that the Defendant be confined to a minimum of 84 months, maximum 113 month in the North Carolina Department of Corrections.

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This sentence to begin at the expiration of sentences for contempt of court.

....

All right. Now with regard to 15-CRS-50247, the jury having found the Defendant guilty of Class G Felony of possession of firearm by a felon, the Court sentences him as a prior Record Level III to a minimum 96 months, maximum 128 months to commence at the expiration of the sentence imposed in 15-CRS-50200.

With regard to the six counts of felony larceny by firearm, let the record reflect that the Defendant having been found guilty of the six Class H Felonies, those felonies now being punishable as a Class D Felony because of habitual felon status, the Court sentences the Defendant to 84 months minimum, 113 months maximum in the North Carolina Department of Corrections and consolidates those for judgment with possession of firearm by felon which is punishable as a Class G Felon in 15-CRS-50247.

....

Consolidating the six firearms by felon with the possession of firearm by felon. The 96 to 128 months run at the expiration of 15-CRS-50200.

....

In . . . case 15-CRS-50196, and that's the breaking and entering and the larceny from the Hill's home at 4602 St. George's Drive, it is the judgment of the Court that the Defendant be confined North Carolina Department of Corrections for a minimum of 84, maximum 113 months to run at the expiration of the judgment imposed in 15-CRS-50247.

....

All right. In case file 15-CRS-50473, the Defendant having been found guilty of felonious breaking or entering a motor and guilty of misdemeanor larceny, consolidate those two counts into one judgment. The breaking and entering of a motor vehicle ordinarily being a Class I Felony is elevated because of the Defendant's habitual

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felon status to a Class E punishment. It is the judgment of the Court that the Defendant be confined to the North Carolina Department of Corrections for a minimum of 33, maximum 52 months.

That sentence will run concurrent with the judgment imposed in 15-CRS-50196.

Following sentencing, Defendant orally appealed.

**II. Standard of Review**

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Additionally, this Court “review[s] the issue of insufficiency of an indictment under a *de novo* standard of review.” *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008).

**III. Analysis**

[1] In his first assignment of error, Defendant argues the trial court erred in allowing Defendant to represent himself because he did not waive his right to counsel, forfeit his right to counsel, or lose his right to counsel through waiver by conduct. Specifically, Defendant contends the trial court erred in allowing Defendant to represent himself because it didn’t conduct the required inquiry under N.C. Gen. Stat. § 15A-1242 for a defendant who voluntarily waives counsel. Defendant bases his argument on the premise the trial court found Defendant voluntarily waived his right to counsel. However, our review of the record indicates Defendant did not waive his right to counsel, but rather forfeited counsel through his conduct. Because we conclude Defendant forfeited his right to counsel, the trial court did not err in failing to conduct the § 15A-1242 inquiry.

A defendant’s right to counsel is a “fundamental component of our criminal justice system,” guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution and Article I of the North Carolina Constitution. *United States v. Cronin*, 466 U.S. 648, 653, 80 L. Ed. 2d 657, 668 (1984). This includes the right of an indigent defendant to appointed counsel. N.C. Gen. Stat. § 7A-450 (2017); *Gideon v. Wainwright*, 372 U.S. 335, 339-56, 9 L. Ed. 2d 799, 802-06 (1963). However, our State appellate

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courts have recognized two circumstances under which a defendant may no longer have the right to be represented by counsel. *State v. Blakeney*, 245 N.C. App. 452, 459, 782 S.E.2d 88, 93 (2016). First, a defendant may voluntarily waive the right to be represented by counsel. *Id.* at 459, 782 S.E.2d at 93. Second, a defendant who engages in serious misconduct may forfeit his constitutional rights to counsel. *Id.* at 460, 782 S.E.2d at 93.

Courts have referred to the situation where a defendant loses counsel though his own conduct as waiver. *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000). However, “a better term to describe this situation is forfeiture.” *Id.* at 524, 530 S.E.2d at 69. “ ‘Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant’s knowledge thereof and irrespective of whether the defendant intended to relinquish the right.’ ” *Id.* at 524, 530 S.E.2d at 69 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. 1995)). “ ‘Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel.’ ” *State v. Leyshon*, 211 N.C. App. 511, 518, 710 S.E.2d 282, 288 (2011) (quoting *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006)). Typically, forfeiture occurs when a defendant obstructs or delays the proceedings by refusing to cooperate with counsel or refusing to participate in the proceedings. *See Blakeney* at 460, 782 S.E.2d at 94-95.

However, unlike forfeiture, a “[d]efendant’s waiver of counsel must be ‘knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.’ ” *State v. Reid*, 224 N.C. App. 181, 190, 735 S.E.2d 389, 396 (2012) (quoting *State v. Thacker* 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980)). Before a trial court allows a defendant to waive representation by counsel, “the trial court must insure that constitutional and statutory standards are satisfied.” *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (internal quotation marks and citations omitted). A trial court will satisfy both the statutory and constitutional standards if it conducts its inquiry pursuant to N.C. Gen. Stat. § 15A-1242. *Id.* at 322, 661 S.E.2d at 724 (citations omitted).

N.C. Gen. Stat. § 15A-1242 (2017) provides the following:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

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- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

*Id.*

Here, neither Defendant nor the State asserts Defendant ever asked to represent himself at trial. Additionally, our review of the record does not reveal any indication Defendant requested to proceed *pro se*. This Court concludes the case at bar is not governed by appellate cases addressing a trial court's responsibility to ensure a defendant who wishes to represent himself is "knowingly, intelligently, and voluntarily" waiving his right to counsel. *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992).

As to forfeiture, "there is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel." *Blakeney* at 461, 782 S.E.2d at 94. This Court has stated:

[F]orfeiture has generally been limited to situations involving "severe misconduct" and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

*Id.* at 461-62, 782 S.E.2d at 94.

The record indicates at the time this matter came to trial, Defendant was with his third attorney, Smith. The trial court appointed Defendant's first attorney, Randall Hughes ("Hughes"), in January and February of 2015. Hughes withdrew in March 2015 after discovering a conflict of interest. The trial court appointed Defendant's second attorney, Andrew Boyd ("Boyd"), on 9 March 2015. On 8 December 2015, Defendant asked the court to remove Boyd and appoint a new attorney. Defendant asserted this was due to ineffective assistance of

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counsel. Here, Defendant stated, “It’s been a bit of a conflict of interest from day one, me and him have not seen eye-to-eye. We go back and forth and get nowhere.” The trial court denied Defendant’s request at that time, but then allowed Boyd to withdraw on 28 January 2016. At Defendant’s request, the trial court appointed Defendant’s third attorney, Smith.

On 5 July 2016, thirteen days prior to trial, Smith filed a motion to withdraw. In that motion, Smith stated Defendant asked him to withdraw, asserted he and Defendant had “irreconcilable differences,” and noted the best interests of the parties would be served by allowing him to withdraw. The trial court heard Smith’s motion to withdraw on 18 July 2016, the first day of Defendant’s trial.

Defendant tried to speak twice as the trial court called the case for trial. Defendant interrupted Smith as Smith addressed his motion to withdraw. Smith explained to the trial court how Defendant refused to answer Smith’s questions about the case, and how Defendant frequently interrupted him. Defendant argued with Smith about undisputed issues. Defendant also told Smith he would present evidence, but refused to tell Smith the substance of the evidence. Additionally, Defendant did not believe Smith’s explanation of the law. Finally, Defendant filed a complaint against Smith with the State Bar.

Defendant constantly interrupted the trial court as it tried to explain to Defendant his right to be represented by counsel. Because Defendant would not allow the trial court to discuss Defendant’s rights to counsel, the trial court excused Defendant and Smith from the courtroom in order for Smith to explain involuntary waiver or forfeiture of counsel. Additionally, in addressing a discovery dispute, the trial court instructed Defendant to hand up everything he had for the court to review. Defendant obstructed handing discovery to Smith to hand to the trial court. The court found Defendant continually interrupted the court for two hours, and he often refused to listen to questions and answer the questions as the trial court was trying to go over his right to counsel. The trial court found Defendant was not trying to understand the process, but was rather just being difficult.

In finding Defendant had forfeited his right to counsel, the trial court noted Defendant and his counsel had discussed forfeiture, and Defendant continued to be argumentative upon returning to the courtroom following the discussion. The trial court also found Defendant was deliberately difficult with his lawyers and the court. Defendant couldn’t cooperate with two of his three attorneys. As for Defendant’s relationship with his third attorney, the trial court stated:

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[T]he Defendant refuses to answer questions that are asked of him, that the Defendant refuses to share with him certain documents that the Defendant says he has in his possession, that the Defendant argues with him and that the Defendant will not listen to him and that he is unable to represent him on that basis.

Additionally,

The Defendant continuously has interrupted the Court as the Court asks questions or tries to address the defendant or tries to address Mr. Forte regarding his rights to Counsel. The Court further finds that the Court gave the Defendant's Counsel, Mr. Smith, and the Defendant and opportunity to leave the courtroom to go to a conference room to discuss the matter, among other things, the illegal forfeiture of Counsel. The Defendant returned to the courtroom. The Defendant continues to be argumentative with this Court.

This Court does find that the Defendant has deliberately been difficult, not only to his lawyer but difficult toward the Court, and that the Defendant refuses to listen, that the Defendant when asked direct questions tries to answer collateral issues and the Defendant claims that he has not been provided discovery.

Based on the foregoing we conclude Defendant forfeited his right to counsel in this case. This assignment of error is overruled.

**[2]** In his second assignment of error, Defendant contends the trial court erred by entering judgment for eight counts of felony larceny where all of the property was stolen in a single transaction. The State concedes the case law clearly states where multiple items are stolen in a single transaction, there is but one larceny. *See State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) (“[A] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place.”). There is nothing in the facts of this case to distinguish it from controlling authority. Because the eight counts of felony larceny all involve property stolen during a single transaction, we vacate seven of the felony larceny convictions. *See State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 682 (1985).

**[3]** In his third assignment of error, Defendant contends there was a fatal variance between the indictment for misdemeanor larceny and

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the evidence at trial. Defendant acknowledges he did not argue fatal variance at trial as a basis for his motion to dismiss. Defendant therefore requests this Court to exercise its discretion to invoke Rule 2 of the Rules of Appellate Procedure to review the alleged variance. As explained below, we exercise our discretion and invoke Rule 2 in order to address Defendant's argument.

This Court has held a "[d]efendant must preserve the right to appeal a fatal variance." *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012). If the fatal variance was not raised in the trial court, this Court lacks the ability to review that issue. *Id.* at 226, 730 S.E.2d at 798. Rule 2 of the Rules of Appellate Procedure allows this Court to suspend the rules regarding the preservation of issues for appeal. However, this Court can invoke Rule 2 only in "exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake." *State v. Pender*, 243 N.C. App. 142, 149, 776 S.E.2d 352, 358 (2015).

Defendant argues there was a fatal variance between the allegation he stole a checkbook from Glenn Cox, and the proof at trial, which showed the checkbook belonged to Cox Auto Salvage. The indictment states:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did break and enter a motor vehicle, a 2003 Dodge Ram, vehicle identification number 1D7HA18DX3J659263, belonging to Glenn F. Cox, which contained things of value, with the intent to commit larceny therein.

Under North Carolina law, "the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 135, 676 S.E.2d 586, 590 (2009) (quoting *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976)).

While there is no evidence tending to show Glenn Cox was the actual owner of Cox Auto Salvage, there is ample evidence indicating Cox had a special property interest in the checkbook. Cox testified the checkbook was his, had his name written on it, and contained stubs of checks he had written. Cox always kept a company checkbook, and he realized the checkbook was missing when he needed to pay a customer. We conclude this evidence establishes Cox was in exclusive possession

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and control of the checkbook, and that he viewed it as being his checkbook. Therefore, Cox had a special property interest in the checkbook. *See State v. Carr*, 21 N.C. App. 470, 471-72, 204 S.E.2d 892, 893-94 (1974) (where a car was registered to a corporation, the son of the owner of that corporation had a special property interest in the car because he was the sole user of the car and in exclusive possession of it). This assignment of error is overruled.

**[4]** In his final assignment of error, Defendant contends the habitual felon indictment was fatally defective because the indictment stated Defendant was charged with one offense and convicted of a different offense. We agree.

This issue is controlled by *State v. Langley*, \_\_\_ N.C. App. \_\_\_, 803 S.E.2d 166, *disc. review allowed*, \_\_\_ N.C. \_\_\_, 805 S.E.2d 483 (2017). In *Langley*, this Court held for a habitual felon indictment to comply with N.C. Gen. Stat. § 14-7.3, the indictment must state the two dates listed for each prior felony conviction: “the date the defendant committed the felony and the date the defendant was convicted of *that same felony* in the habitual felon indictment.” *Id.* at \_\_\_, 803 S.E.2d at 171 (emphasis in original). “The dates of offense and the corresponding dates of conviction are essential elements of the habitual felon indictment because of the temporal requirements of N.C.G.S. § 14-7.1” *Id.* at \_\_\_, 803 S.E.2d at 172.

The habitual felon indictment in *Langley* stated, *inter alia*:

[2. T]hat on or about October 8, 2009, the defendant did commit the felony of Robbery with a Dangerous Weapon, in violation of North Carolina General Statute 14-87, and that on or about September 21, 2010, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina[.]

[3. T]hat on or about August 24, 2011, the defendant did commit the felony of Robbery with a Dangerous Weapon, in violation of North Carolina General Statute 14-87.1, and that on or about May 5, 2014, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina[.]

*Id.* at \_\_\_, 803 S.E.2d at 171.

This Court held the allegations in the second and third paragraphs of the habitual felon indictment in *Langley* failed to comply with N.C. Gen. Stat. § 14-7.3 because the indictment did not provide the offense dates

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for common law robbery and instead “alleged offense dates for robberies with a dangerous weapon, and then gave conviction dates for two counts of common law robbery.” *Id.* at \_\_\_, 803 S.E.2d at 171. Therefore, this Court concluded the habitual felon indictment failed to comply with N.C. Gen. Stat. § 14-7.3 because it “did not provide an offense date for the crime the State *convicted* Defendant for committing.” *Id.* at \_\_\_, 803 S.E.2d at 172. Because the habitual felon indictment was facially defective, this Court vacated the defendant’s status as a habitual felon and remanded for resentencing without the habitual felon enhancement. *Id.* at \_\_\_, 803 S.E.2d at 172.

The indictment in the instant case is indistinguishable from the indictment in *Langley*. The first paragraph of Defendant’s habitual indictment alleged:

[T]hat on or about September 15, 1998, Jimmy Lee Forte, Jr. was charged with the felony of Robbery With Dangerous Weapon in violation of G.S. 14-87, and that on or about July 19, 2000, Jimmy Lee Forte, Jr. was convicted of the felony of Common Law Robbery in the Superior Court of Wilson County, North Carolina[.]

As in *Langley*, the habitual felon indictment in the current case is facially defective because the indictment did not allege an offense date for the crime Defendant was convicted (common law robbery). *See id.* at \_\_\_, 803 S.E.2d at 171-72. Because the indictment does not comply with N.C. Gen. Stat. § 14-7.3 as interpreted by this Court in *Langley*, we vacate the judgment sentencing Defendant as a habitual felon.

AFFRIMED IN PART, VACATED AND REMANDED IN PART.

Judge ZACHARY concurs.

Judge Dietz concurs in a separate opinion.

DIETZ, Judge, concurring.

I cannot join in the majority’s decision to invoke Rule 2 of the Rules of Appellate Procedure to reach Forte’s unpreserved fatal variance argument. “As our Supreme Court has instructed, we must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because ‘inconsistent application’ of Rule 2 itself leads to injustice when some similarly situated

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litigants are permitted to benefit from it but others are not.” *State v. Bishop*, \_\_ N.C. App. \_\_, \_\_, 805 S.E.2d 367, 370 (2017).

There is nothing extraordinary about this case, and the majority does not even bother to assert that there is. Indeed, the majority concludes that Forte’s fatal variance argument is meritless (and I agree). Why then, does the majority invoke the “extraordinary remedy” of Rule 2, which is limited solely to cases in which it is needed to prevent manifest injustice? I can’t explain it. But our Supreme Court has explained the danger of using Rule 2 in cases that are not extraordinary and do not raise issues of manifest injustice:

Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority. Furthermore, inconsistent application of the Rules may detract from the deference which federal habeas courts will accord to their application. Although a petitioner’s failure to observe a state procedural rule may constitute an “adequate and independent state ground[ ]” barring federal habeas review, *Wainwright v. Sykes*, 433 U.S. 72, 81, 97 S. Ct. 2497, 2503, 53 L.Ed.2d 594, 604 (1977), a state procedural bar is not “adequate” unless it has been “consistently or regularly applied.” *Johnson v. Mississippi*, 486 U.S. 578, 589, 108 S. Ct. 1981, 1988, 100 L.Ed.2d 575, 586 (1988). Thus, if the Rules are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly.

*State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007).

The majority’s decision to invoke Rule 2 in a case where there is nothing extraordinary and no risk of manifest injustice is flatly inconsistent with Supreme Court precedent. I will not join the majority in further eroding the consistent, uniform application of our State’s procedural rules.

**STATE v. GENTLE**

[260 N.C. App. 269 (2018)]

STATE OF NORTH CAROLINA

v.

DARREN WAYNE GENTLE

No. COA17-696

Filed 3 July 2018

**1. Rape—jury instruction—serious personal injury—mental or emotional harm**

In a trial for rape, sexual offense, kidnapping, and crime against nature, the trial court did not commit plain error by instructing the jury it could find that the victim suffered a “serious personal injury” based on a mental injury which would elevate the first two offenses to the first degree, since the State presented sufficient evidence from which the jury could find a serious personal injury based on the physical injuries defendant inflicted on the victim.

**2. Crimes, Other—crime against nature—committed in a public place—sufficiency of evidence**

In a prosecution for crime against nature, evidence that the offense occurred near the bottom of the stairs in a parking lot was sufficient to support the theory of the crime being committed in a “public place,” despite other evidence describing the location as being “dark and wooded,” since there is no requirement that the sexual acts giving rise to the crime occur in public view.

**3. Appeal and Error—preservation of issues—constitutional argument—untimely request**

Defendant’s petition for writ of certiorari was denied and his request for appellate review dismissed regarding whether the trial court erred by ordering defendant to submit to lifetime satellite-based monitoring before making a reasonableness determination where defendant failed to raise the issue before the trial court and failed to argue specific facts demonstrating manifest injustice.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by defendant from judgment and order entered 6 October 2016 by Judge Lindsay R. Davis in Randolph County Superior Court. Heard in the Court of Appeals 7 February 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph E. Elder, for the State.*

**STATE v. GENTLE**

[260 N.C. App. 269 (2018)]

*Richard J. Costanza, for defendant-appellant.*

CALABRIA, Judge.

Darren Wayne Gentle (“defendant”) appeals from the trial court’s judgment entered upon jury verdicts finding him guilty of first-degree forcible rape, first-degree forcible sexual offense, second-degree kidnapping, and committing a crime against nature. After careful review, we conclude that defendant received a fair trial, free from prejudicial error. Defendant has also filed a petition for writ of certiorari requesting review of the trial court’s order requiring him to enroll in satellite-based monitoring (“SBM”) for the remainder of his natural life. However, defendant failed to preserve his constitutional challenge to the SBM order by raising the argument at trial. Accordingly, we deny defendant’s petition for writ of certiorari and dismiss his appeal of the issue for lack of jurisdiction.

**I. Factual and Procedural Background**

In August 2015, Jane Smith (“Smith”),<sup>1</sup> age 25, was approximately seven months pregnant and living with her boyfriend at his mother’s house in Asheboro, North Carolina. At around 4:00 p.m. on 28 August 2015, Smith had an argument with her boyfriend’s mother and left the residence. She walked to a gas station to purchase cigarettes. However, when Smith arrived to the gas station at 5:00 p.m., the clerk refused to sell cigarettes to her because she did not have identification. Smith saw defendant staring at her and asked him to purchase cigarettes for her; he agreed. Defendant invited Smith to purchase crack cocaine, and she did so. Smith and defendant met with a drug dealer, purchased crack cocaine, and then walked to a shed at defendant’s parents’ house, which contained a bed, chairs, and a television. At the shed, Smith injected crack cocaine, while defendant smoked it and some marijuana. After using the drugs, Smith walked back to the gas station to meet a friend. Defendant subsequently returned to the gas station and invited Smith to use more drugs; she agreed. They walked to a parking lot surrounded by a dark, wooded area.

Once they were in the parking lot, defendant approached Smith from behind and threatened her. Smith resisted and attempted to flee, but defendant caught up to her near the stairs of the parking lot. As Smith struggled to protect her stomach, defendant dragged her down the

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1. A pseudonym is used for the privacy of the victim.

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stairs, forced her into the woods, and removed her clothing. Defendant disrobed and inserted his fingers into Smith's anus and vagina. She told him to stop, but he did not. He then placed his penis in her anus and vagina. Smith did not consent to these acts. Afterwards, defendant repeatedly expressed concern that Smith would contact law enforcement, but she assured him that she would not, due to outstanding warrants for her arrest. Instead, she asked if they could return to defendant's shed. Defendant led Smith back to the shed, where they both fell asleep.

When Smith awoke, defendant prevented her from leaving. She told defendant that she needed to get to a hospital to receive treatment for the scrapes she incurred during the struggle. She changed clothes, and defendant allowed her to leave the shed. He invited her back into the woods, but she declined. Smith saw a neighbor, and as she approached him, defendant fled into the woods. Smith asked the neighbor for something to drink and contacted her father. Smith's father arrived and took her to the hospital.

At the hospital, Smith informed medical staff that she had been raped. She denied having used drugs. Smith also spoke with a detective, who photographed her injuries. The next day, she turned herself in for her outstanding warrants.

On 14 March 2016, defendant was indicted for first-degree rape, kidnapping, crime against nature, and first-degree sexual offense. Trial commenced on 4 October 2016 in Randolph County Superior Court. Defendant did not present evidence but moved to dismiss all charges at the close of the State's evidence and at the close of all the evidence. The trial court denied both motions.

On 6 October 2016, the jury returned verdicts finding defendant guilty of first-degree rape, second-degree kidnapping, crime against nature, and first-degree sexual offense. The trial court arrested judgment on the kidnapping charge. The trial court then consolidated judgments on the remaining charges, and sentenced defendant to a minimum of 365 months and a maximum of 498 months in the custody of the North Carolina Division of Adult Correction. The court further ordered that defendant register as a sex offender and, upon his release from prison, be enrolled in SBM for the remainder of his natural life.

Defendant appeals.

## II. Jury Instruction

[1] In his first argument, defendant contends that the trial court erred by instructing the jury that it could find that the victim suffered a "serious

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personal injury” in the form of a mental injury, because the State presented no evidence to support such instruction. Because he failed to object to the allegedly erroneous instruction at trial, defendant requests plain error review of this issue.

A. Standard of Review

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4). The plain error standard of review applies “to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (citation and internal quotation marks omitted). Plain error arises when the error is “so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted).

B. Analysis

For several decades, our appellate courts consistently held “that it was per se plain error for a trial court to instruct the jury on a theory of the defendant’s guilt that was not supported by the evidence.” *State v. Robinson*, \_\_ N.C. App. \_\_, \_\_, 805 S.E.2d 309, 318 (2017) (citation omitted). However, in *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013) (per curiam), our Supreme Court adopted a dissent from this Court which advocated a “shift away from the *per se* rule . . . that a reviewing court ‘must assume’ that the jury relied on the improper theory.” *State v. Martinez*, \_\_ N.C. App. \_\_, \_\_, 801 S.E.2d 356, 361 (2017) (citation omitted); *see also State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013) (reversing per curiam for the reasons stated in *State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012) (Stroud, J., dissenting)). “Rather, under *Boyd*, a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate theory.” *Martinez*, \_\_ N.C. App. at \_\_, 801 S.E.2d at 361 (concluding that the defendant “failed to meet his burden of showing that the trial court’s inclusion of ‘analingus’ in the jury instruction had any *probable* impact on the jury’s

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verdict[,]” because the victim “was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred”).

In North Carolina, the offenses of forcible rape and forcible sexual offense may be elevated to the first degree when the offender “[i]nflicts serious personal injury upon the victim . . . .” N.C. Gen. Stat. § 14-27.21(a)(2) (2017); *id.* § 14-27.26(a)(2). The State may offer evidence of bodily or mental injuries to prove that the victim suffered a “serious personal injury.” *State v. Boone*, 307 N.C. 198, 204, 297 S.E.2d 585, 589 (1982), *overruled on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). “In determining whether serious personal injury has been inflicted, the court must consider the particular facts of each case.” *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 367 (1988). The element may be established through evidence of

a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim or another for the purpose of concealing the crimes or to aid in the assailant’s escape.

*Id.* (citation omitted).

In order to prove a serious personal injury based on mental or emotional harm, the State must show that (1) the defendant caused the harm; (2) the harm extended for some appreciable period of time beyond the incidents surrounding the crime; and (3) the harm was more than the *res gestae* results that are inherent to every forcible rape or sexual offense. *State v. Finney*, 358 N.C. 79, 90, 591 S.E.2d 863, 869 (2004). “*Res gestae* results are those so closely connected to an occurrence or event in both time and substance as to be a part of the happening.” *Id.* (citation, quotation marks, and brackets omitted).

In the instant case, the State presented substantial evidence that defendant inflicted bodily harm upon Smith as he attempted to overcome her resistance. *See Herring*, 322 N.C. at 739, 370 S.E.2d at 367. Although she attempted to fight, Smith was approximately seven months pregnant, and she struggled to protect her stomach while defendant forcibly dragged her down 33 concrete stairs and into the nearby woods. Smith sustained extensive bruises and abrasions to most of the

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left side of her body, including her leg, abdomen, back, side, arm, and shoulder. Although some of her wounds were superficial, others were “much, much deeper” abrasions that stripped off the first layer of skin and exposed the dermis. At trial, Jennifer Whitley, the Sexual Assault Nurse Examiner who treated Smith at the hospital, compared her injuries to the “road rash” that a person might suffer after falling off a motorcycle traveling at 55 miles per hour. Smith testified that her injuries were very painful, and she still bore extensive scars at trial.

On appeal, defendant asserts that the trial court’s erroneous mental injury instruction probably impacted the jury’s verdicts, because the evidence supporting the seriousness of Smith’s *bodily* injuries was “equivocal.” For support, defendant cites the following testimony:

[THE STATE:] Let me ask you this. How were you treated at the hospital? What did they do for your injuries?

[SMITH:] There wasn’t much—they gave me antibiotics for the scrapes, bandaged up my legs, but there wasn’t more they could do.

Q. No broke bones, internal injuries, nothing like that?  
*Nothing serious?*

A. No.

(Emphasis added).

The trial court, however, rejected this very same argument in denying defendant’s motion to dismiss the charges of first-degree forcible rape and sexual offense. Once the trial court determined that the State presented sufficient evidence to withstand defendant’s motion to dismiss, it was for the jury, as finders of fact, to determine whether Smith sustained a serious personal injury. The trial court instructed the jury that second-degree rape and sexual offense differ from the first-degree offenses “only in that it is not necessary for the State to prove beyond a reasonable doubt that the defendant inflicted serious personal injury upon the alleged victim.” During deliberations, the jury requested to review pictures of Smith’s “personal injuries down her left side.” After the jury found defendant guilty of both offenses in the first degree, defense counsel requested that the jury be individually polled on the charge of first-degree rape. The jurors unanimously affirmed their verdict.

Consequently, even assuming, *arguendo*, that there was no evidence to support the trial court’s instruction on mental injury, defendant failed to meet his burden of showing that the alleged error

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had any probable impact on the jury's verdict. *Martinez*, \_\_ N.C. App. at \_\_, 801 S.E.2d at 361. This argument is overruled.

**III. Motion to Dismiss**

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the crime against nature charge, because the State failed to offer substantial evidence that the offense was committed in a "public place." We disagree.

**A. Standard of Review**

In reviewing a criminal defendant's motion to dismiss, the question for the trial court "is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "[T]he trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). We review the trial court's denial of a criminal defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

**B. Analysis**

Pursuant to N.C. Gen. Stat. § 14-177 (2017), "[i]f any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." "[P]enetration by or of a sexual organ is an essential element" of the crime against nature. *State v. Stiller*, 162 N.C. App. 138, 140, 590 S.E.2d 305, 307 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 358 N.C. 240, 596 S.E.2d 19 (2004). "[T]he offense is broad enough to include all forms of oral and anal sex, as well as unnatural acts with animals." *Id.*

N.C. Gen. Stat. § 14-177 "punish[es] persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality." *State v. Hunt*, 365 N.C. 432, 440, 722 S.E.2d 484, 490 (2012) (citation and quotation marks omitted). The statute "is unconstitutional when used

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to criminalize acts within private relations protected by the Fourteenth Amendment liberty interest.” *State v. Whiteley*, 172 N.C. App. 772, 779, 616 S.E.2d 576, 581 (2005) (citing *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed 2d 508 (2003)). However, N.C. Gen. Stat. § 14-177 is facially constitutional and “may properly be used to prosecute conduct in which a minor is involved, conduct involving non-consensual or coercive sexual acts, conduct occurring in a public place, or conduct involving prostitution or solicitation[.]” *Id.*

In the instant case, the trial court instructed the jury on the “public place” theory of the crime against nature. In this context, “[a] place is public if it is open or available for all to use, share, or enjoy.” *In re R.L.C.*, 179 N.C. App. 311, 318, 635 S.E.2d 1, 5 (2006) (citation and quotation marks omitted), *aff’d on other grounds*, 361 N.C. 287, 643 S.E.2d 920, *cert. denied*, 552 U.S. 1024, 169 L. Ed. 2d 396 (2007). “A parking lot is available for all to use and is thus a public place.” *Id.*

On appeal, defendant contends that the State failed to prove that the offense occurred in a “public place” because “the events described by [Smith] occurred well outside the public view in an area . . . described as ‘dark’ and ‘wooded.’ ” We disagree.

It is a violation of N.C. Gen. Stat. § 14-177 to engage in sexual acts in a public place; there is no requirement that the prohibited conduct occur *in public view*. See *id.* (explaining that “whether anyone saw respondent engaged in sexual behavior in a parked car in a public parking lot is immaterial to whether he engaged in the activity in a public place”). Similarly, Smith’s description of the “dark” and “wooded” area does not foreclose its status as a public place. Indeed, Smith consistently testified that the offenses occurred at the bottom of the stairs in the parking lot:

[THE STATE:] . . . Did you say anything or scream anything while you were being pulled down the steps?

[SMITH:] I was telling him to stop. I was screaming stop.

Q. Did he stop?

A. No.

Q. Okay. When you got to the bottom of the steps, what happened then?

A. He got on top of me. He started pulling his clothes off, his shorts and his underwear off. He pulled my shorts off, pulled my underwear off, and began to finger me.

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...

[THE STATE:] Okay. Just so we're clear, where this happened, how far did he drag you into the woods?

[SMITH:] Well we weren't even probably like 10, 5 feet from the stairs.

...

[THE STATE:] Okay. Did you ask him to take you anywhere, at some point?

[SMITH:] I—yeah. I did ask to go back to his shed. That was an attempt to hopefully get him to walk me back through the roads so I could try and get some help from someone.

Q. Okay. Now, this happened at the bottom of the stairway, correct?

A. Yes.

Q. Okay. After he did this to you, did ya'll go back up the stairs? Where did ya'll go?

A. No. We went through the woods? [sic]

Q. Did you know where you were?

A. No.

Q. Were you familiar with those woods?

A. No.

Q. Okay. At what point, after walking in the woods with him, did you ask him if you could go back to the shed with him?

A. This was when we were still at the bottom of the stairs, before we ever started walking anywhere.

Investigating officers subsequently discovered Smith's shorts, underwear, and a flip-flop in the woods approximately 30 feet away from the bottom of the parking lot stairs.

Taken in the light most favorable to the State, this is sufficient evidence from which a reasonable juror could conclude that defendant unlawfully engaged in sexual acts in a public place. Therefore, the trial

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court did not err by denying defendant's motion to dismiss the crime against nature charge.

IV. Satellite-Based Monitoring

[3] In his last argument, defendant requests that we grant his petition for writ of certiorari to review the trial court's order requiring him to enroll in SBM for the remainder of his natural life. Defendant argues that the trial court erred by ordering him to submit to SBM without first making a reasonableness determination as required by *Grady v. North Carolina*, 575 U.S. \_\_\_, 191 L. Ed. 2d 459 (2015) (per curiam). However, defendant concedes that he failed to make this constitutional argument to the trial court, and that his appeal from the SBM order is untimely. Accordingly, defendant implicitly "asks this Court to take *two* extraordinary steps to reach the merits, first by issuing a writ of certiorari to hear th[e] appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument." *State v. Bishop*, \_\_ N.C. App. \_\_, \_\_, 805 S.E.2d 367, 369 (2017), *disc. review denied*, \_\_ N.C. \_\_, 811 S.E.2d 159 (2018). We decline to do so.

As we explained in *Bishop*, "[a] writ of certiorari is not intended as a substitute for a notice of appeal. If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals." *Id.* Rather, "a petition for the writ must show merit or that error was probably committed below." *Id.* (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)).

As in *Bishop*, defendant's Fourth Amendment argument "is procedurally barred because he failed to raise it in the trial court." *Id.* Like the *Bishop* defendant, he had the benefit of our Court's decisions in *State v. Morris*, 246 N.C. App. 349, 783 S.E.2d 528 (2016) and *State v. Blue*, 246 N.C. App. 259, 783 S.E.2d 524 (2016), which "outlined the procedure defendants must follow to preserve a Fourth Amendment challenge to satellite-based monitoring in the trial court." *Id.* Therefore, "the law governing preservation of this issue was settled at the time [defendant] appeared before the trial court." *Id.* Since defendant "is no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2," we deny defendant's petition for writ of certiorari and dismiss his appeal of this issue. *Id.* at \_\_, 805 S.E.2d at 370.

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V. Conclusion

Even assuming, *arguendo*, that the trial court erroneously instructed the jury that it could find that Smith suffered a serious personal injury based on mental harm, defendant failed to prove that such error probably impacted the jury's verdicts finding him guilty of first-degree forcible rape and forcible sexual offense. The trial court did not err by denying defendant's motion to dismiss the crime against nature charge, because the State presented substantial evidence that the offense occurred in a "public place." In our discretion, we deny defendant's petition for writ of certiorari and dismiss his untimely appeal of the trial court's SBM order.

NO ERROR IN PART; DISMISSED IN PART.

Judge ZACHARY concurs.

Judge ARROWOOD concurs in part and dissents in part by separate opinion.

ARROWOOD, Judge, concurring in part, dissenting in part.

I agree with the majority opinion that defendant failed to show that any alleged error with respect to the mental injury instruction had a probable impact on the jury's verdict, and that the trial court did not err by denying defendant's motion to dismiss the charge of committing a crime against nature. With respect to the third issue, given that the State has conceded error, I respectfully dissent. Unlike the majority, I would issue a writ of certiorari to hear defendant's third argument on appeal, and then invoke Rule 2 of the North Carolina Rules of Appellate Procedure to address the merits of the argument.

Our Court has discretion to allow a petition for a writ of certiorari to review judgments and orders below when, as here, "the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1) (2018). Such relief "is not intended as a substitute for a notice of appeal." *State v. Bishop*, \_\_ N.C. App. \_\_, \_\_, 805 S.E.2d 367, 369 (2017), *disc. review denied*, \_\_ N.C. \_\_, 811 S.E.2d 159 (2018). Thus, our Court must only allow writs of certiorari that "show merit or that error was probably committed below." *Id.* (citation omitted).

Under Rule 2, "[t]o prevent manifest injustice to a party[ ] . . . either court of the appellate division may[ ] . . . suspend or vary the requirements or provisions of any of [the North Carolina Rules of Appellate

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Procedure] in a case pending before it upon application of a party or upon its own initiative[.]” N.C.R. App. P. 2 (2018). Our Court only invokes Rule 2 in exceptional circumstances to address “significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances.” *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis, citations, and quotation marks omitted). A determination as to “whether a particular case is one of the rare ‘instances’ appropriate for Rule 2 review—must necessarily be made in light of the specific circumstances of individual cases and parties, such as whether ‘substantial rights of an appellant are affected.’” *Id.* (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)). Invoking Rule 2 is a case-specific decision that “rests in the discretion of the panel assigned to hear the case and is not constrained by precedent.” *State v. Bursell*, \_\_ N.C. App. \_\_, \_\_, 813 S.E.2d 463, 467 (2018) (citation omitted).

Defendant argues the trial court erred by ordering defendant to submit to the satellite-based monitoring (“SBM”) program without first determining whether the order was reasonable. As the majority explains, defendant failed to appeal the SBM order, and did not object at trial to preserve the issue for appeal; therefore, a writ of certiorari must be granted and Rule 2 must be invoked before our Court can address this argument.

In *Grady v. North Carolina*, 575 U.S. \_\_, 191 L. Ed. 2d 459 (2015) (per curiam), the Supreme Court of the United States held that North Carolina’s SBM program effectuates a continuous warrantless search, subject to the Fourth Amendment. *Id.* at \_\_, 191 L. Ed. 2d at 462. Accordingly, before ordering a defendant to enroll in the SBM program, a trial court must “determine, based on the totality of the circumstances, if the SBM program is reasonable when properly viewed as a search.” *State v. Blue*, 246 N.C. App. 259, 265, 783 S.E.2d 524, 527 (2016) (citations omitted). Here, nothing in the record indicates the trial court considered the reasonableness of the order before ordering defendant to enroll in the SBM program for the rest of his natural life. This failure violated defendant’s Fourth Amendment rights. *See id.* Therefore, it would be appropriate to grant writ of certiorari to hear this issue, and I would exercise the discretion to do so.

To prevent manifest injustice, I would also invoke Rule 2. The trial court deprived defendant of a substantial right when it did not address the reasonableness of subjecting him to SBM for the rest of his life. *See Bursell*, \_\_ N.C. App. at \_\_, 813 S.E.2d at 467 (“It is axiomatic that a constitutional right is a ‘substantial right.’”). Although this deprivation

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does not *require* us to invoke Rule 2, in view of the gravity of subjecting defendant to a potentially unreasonable search for life in violation of his substantial rights under the Fourth Amendment, and the State's concession that, had this issue been properly preserved, the trial court's failure would amount to reversible error, I would invoke Rule 2 to review defendant's argument.

I now turn to the merits of defendant's argument. Because nothing in the record indicates the trial court considered the reasonableness of ordering defendant's lifelong participation in the SBM program, as required by *Grady*, there was *Grady* error. The State concedes this error. I would vacate the SBM order without prejudice to the State's ability to file a subsequent SBM application.

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STATE OF NORTH CAROLINA

v.

DONALD JOSEPH KUHNS

No. COA17-519

Filed 3 July 2018

**Criminal Law—jury instruction—defenses—defense of habitation**

The trial court erred in a prosecution for first-degree murder by denying defendant's request for a jury instruction on defense of habitation where the victim continued to return to defendant's property and threaten him with bodily harm despite numerous requests to leave and multiple orders from law enforcement, and it was not disputed that the victim was within the curtilage of defendant's property. There was prejudice because a person who uses permissible force is immune from civil or criminal liability.

Appeal by defendant from judgment entered 13 May 2016 by Judge Julia Lynn Gullett in Alexander County Superior Court. Heard in the Court of Appeals 29 November 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.*

**STATE v. KUHN**

[260 N.C. App. 281 (2018)]

CALABRIA, Judge.

Donald Joseph Kuhns (“defendant”) appeals from a judgment entered upon a jury’s verdict finding him guilty of voluntary manslaughter. After careful review, we conclude that the trial court committed prejudicial error by denying defendant’s request for a jury instruction on the defense of habitation, N.C.P.I.–Crim. 308.80. Therefore, we reverse the trial court’s judgment and remand for a new trial.

**I. Factual and Procedural Background**

In October 2014, defendant lived across the road from his son (“George”) in the Johnny Walker Mobile Home Park (“JWMHP”) in Hiddenite, North Carolina. Kenneth Nunnery (“Nunnery”) and Johnny Dockery (“Dockery”) lived in separate homes on nearby Ervin Lane. Defendant, George, Nunnery, and Dockery were friends and frequently spent time together.

After defendant came home from work at 4:30 p.m. on 2 October 2014, he went over to George’s home to drink beer. Nunnery joined them around 5:30 p.m., although he does not drink alcohol. Approximately an hour later, the three men were talking outside George’s home when Dockery and his girlfriend (“Kim”) arrived. Dockery had a jar of “moonshine” and two shot glasses with him. Dockery and Kim were already intoxicated and started arguing. After defendant told him to “leave her alone,” Dockery became angry and “started saying [he] better not catch nobody with his girlfriend, he’d kill them.” Kim drove away, and Dockery ran after her.

The dispute between defendant and Dockery continued to escalate over the next several hours. At 8:17 p.m., Dockery called 911 to report that Kim was driving while intoxicated. When Deputy Terry Fox (“Deputy Fox”) arrived, he heard loud voices coming from the JWMHP and went to investigate. Dockery was standing in the middle of the road, shouting in the direction of defendant’s home. Dockery told Deputy Fox that he was arguing with defendant, but that defendant was his friend whom he sometimes called “Dad.” During their conversation, defendant exited his home, walked over to George’s, and reappeared with a 12-pack of beer. As he returned home, defendant warned Deputy Fox that Dockery needed to leave before “something bad” happened. Deputy Fox ordered Dockery to go home and watched him to ensure that he complied.

However, at 9:15 p.m., defendant called 911 and reported that Dockery was standing in defendant’s yard, “threatening [his] life” and “running his mouth. He’s been drinking white liquor and . . . he’s a friend

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of mine, but today he's not a friend." Defendant explained that he did not want to press charges or "hurt nobody"; rather, he "just want[ed Dockery] out of [his] face." When law enforcement arrived, Dockery was "yelling pretty loud." He told the officers that "people were being rude to him" and "called him names." Defendant warned them to tell Dockery "not to come back or he would do something about it." The officers again instructed Dockery to go home, and followed him to ensure that he complied.

At approximately 10:00 p.m., the argument culminated in a final confrontation in defendant's yard, which ended when defendant fatally shot Dockery. However, conflicting evidence was presented at trial to explain how these events transpired. Defendant's next-door neighbor, Angela McFee, testified that minutes before the shooting, she was sitting on her porch when she overheard defendant taunting Dockery as he walked home through a nearby field. According to McFee, defendant said, "[T]hat's right, take your f---ing a-- home," and used a racial slur. At that point, Dockery walked over to defendant's yard, and the men began "cursing and fussing." Dockery asked defendant "if he had his gun out, and [defendant] said yeah."

However, according to defendant, he was inside his home, attempting to sleep, when he heard Dockery yelling, "[C]ome on out here, you son of a bitch, I'm going to kill you." Defendant retrieved his .32-caliber pistol and went outside onto the porch, approximately six and one-half feet above the yard. Dockery was in the yard just beside the porch, "cussing and hollering" at defendant. Defendant told Dockery to go home. When Dockery saw the gun, he said, "[Y]ou're going to need more than that P shooter, motherf---er, I've been shot before." According to defendant, Dockery was pacing back and forth, and then "came at [him] really fast." Defendant took a step back and fired one shot. The bullet struck Dockery just above his left eyebrow, killing him.

On 3 October 2014, Alexander County Sheriff's Office deputies executed an arrest warrant charging defendant with first-degree murder. Defendant was indicted for the same offense on 27 October 2014. Trial commenced during the 3 May 2016 session of Alexander County Superior Court. Following the State's presentation of evidence, defendant presented evidence, including his own testimony.

At the charge conference, after the trial court included self-defense within its list of proposed jury instructions, defense counsel requested that the court exclude all references to defendant as the aggressor. In addition, defense counsel requested that the trial court deliver

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N.C.P.I.–Crim. 308.80, the pattern jury instruction pertaining to the defense of habitation. After considering arguments from both parties, the trial court denied both of defendant’s requests. The trial court concluded that there were “factual issues that must be resolved by the jury with respect to the aggressor issue,” and that N.C.P.I.–Crim. 308.80 “did not apply because there was no evidence that [Dockery] was trying to break in.” Following the jury charge, defendant renewed his objection to the trial court’s denial of his requested instructions.

On 13 May 2016, the jury returned a verdict finding defendant guilty of the lesser-included offense of voluntary manslaughter. The trial court sentenced defendant to 73 to 100 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

## II. Defense of Habitation

On appeal, defendant first argues that the trial court erred by denying his request for a jury instruction on the defense of habitation, pursuant to N.C.P.I.–Crim. 308.80. We agree.

“The prime purpose of a court’s charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). Accordingly, “[i]t is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence.” *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). In determining whether the evidence is sufficient to entitle the defendant to jury instructions on a defense, the trial court must consider the evidence in the light most favorable to the defendant. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988). The “trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence.” *State v. Wilson*, 354 N.C. 493, 516, 556 S.E.2d 272, 287 (2001) (citation omitted). Whether the trial court erred in instructing the jury is a question of law, reviewed *de novo* on appeal. *State v. Bass*, \_\_ N.C. App. \_\_, \_\_, 802 S.E.2d 477, 481, *temp. stay allowed*, \_\_ N.C. \_\_, 800 S.E.2d 421 (2017).

North Carolina has long recognized that “[a] man’s house, however humble, is his castle, and his castle he is entitled to protect against invasion[.]” *State v. Gray*, 162 N.C. 608, 613, 77 S.E. 833, 835 (1913). Commonly known as the “castle doctrine,” the defense of habitation “is based on the theory that if a person is bound to become a fugitive from her own home, there would be no refuge for her anywhere in the world.” *State v. Stevenson*, 81 N.C. App. 409, 412, 344 S.E.2d 334, 335 (1986).

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“The principle that one does not have to retreat regardless of the nature of the assault upon him when he is in his own home and acting in defense of himself, his family and his habitation is firmly embedded in our law.” *State v. McCombs*, 297 N.C. 151, 156, 253 S.E.2d 906, 910 (1979). At common law, the use of deadly force in defense of the habitation was justified only to prevent a forcible entry under circumstances where the occupant reasonably apprehended death or great bodily harm to himself or others, or believed that the assailant intended to commit a felony. *Id.* at 156-57, 253 S.E.2d at 910. “Once the assailant . . . gained entry, however, the usual rules of self-defense replace[d] the rules governing defense of habitation,” although there remained no duty to retreat. *Id.* at 157, 253 S.E.2d at 910.

The common-law rule limiting the defense of habitation to circumstances where the defendant was acting to prevent forcible entry into the home was eliminated in 1993, when our General Assembly enacted N.C. Gen. Stat. § 14-51.1. *State v. Blue*, 356 N.C. 79, 89, 565 S.E.2d 133, 139 (2002). N.C. Gen. Stat. § 14-51.1 “broadened the defense of habitation to make the use of deadly force justifiable whether to *prevent* unlawful entry into the home or to *terminate* an unlawful entry by an intruder.” *Id.* In 2011, the General Assembly repealed N.C. Gen. Stat. § 14-51.1 and enacted our current defensive force statutes, N.C. Gen. Stat. §§ 14-51.2, -51.3, and -51.4. *See generally* An Act To Provide When A Person May Use Defensive Force And To Amend Various Laws Regarding The Right To Own, Possess, Or Carry A Firearm In North Carolina, 2011 N.C. Sess. Laws 268.

Our amended “statutes provide two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability.” *State v. Lee*, \_\_ N.C. \_\_, \_\_, 811 S.E.2d 563, 566 (2018). Pursuant to N.C. Gen. Stat. § 14-51.3(a), “a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies”: (1) the person “reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another”; or (2) under the circumstances permitted by N.C. Gen. Stat. § 14-51.2.

N.C. Gen. Stat. § 14-51.2, entitled “Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm,” provides, in pertinent part:

(a) The following definitions apply in this section:

- (1) Home.—A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile

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or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence.

...

(b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

- (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
- (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(c) The presumption set forth in subsection (b) of this section shall be rebuttable . . . .

...

(d) A person who unlawfully and by force enters or attempts to enter a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

(e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . .

(f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.

(g) This section is not intended to repeal or limit any other defense that may exist under the common law.

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During the charge conference, defendant requested that the trial court provide N.C. Gen. Stat. § 14-51.2's corresponding pattern jury instruction, N.C.P.I.–Crim. 308.80 "Defense of Habitation – Homicide and Assault." The trial court, however, determined that defendant was not entitled to the requested instruction because there was no evidence that he "was trying to prevent an entry." According to the trial court, defendant's evidence demonstrated that he was attempting to prevent injury to himself, "not that he was trying to prevent somebody from coming into his curtilage or home."

The trial court's ruling was in error. As explained in the "Note Well" preceding the pattern instruction, "[t]he use of force, including deadly force, is justified when the defendant is acting to prevent a forcible entry into the defendant's home, other place of residence, workplace, or motor vehicle, *or to terminate an intruder's unlawful entry.*" N.C.P.I.–Crim. 308.80 (emphasis added). This language accurately summarizes the presumption accorded to the lawful occupant of a home who utilizes deadly force to defend the habitation. N.C. Gen. Stat. § 14-51.2(b). Moreover, for purposes of the statute, "home" means "[a] building or conveyance of any kind, *to include its curtilage*, whether the building or conveyance is temporary or permanent, *mobile or immobile*, which has a roof over it, including a tent, and is designed as a temporary or permanent residence." N.C. Gen. Stat. § 14-51.2(a)(1) (emphases added).

On appeal, the State concedes that Dockery was "standing beside the porch on the ground, within the curtilage" of defendant's property when defendant fired the fatal shot. However, the State contends that defendant was not entitled to the requested defense of habitation instruction, because Dockery "never came on Defendant's porch and never tried to open the door to Defendant's trailer." We disagree.

The State's interpretation defies the plain language of the statute. "If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls." *State v. Holloman*, 369 N.C. 615, 628, 799 S.E.2d 824, 832-33 (2017) (citation omitted). The language of N.C. Gen. Stat. § 14-51.2(b) is clear: the same rebuttable presumption of lawfulness applies if the person against whom defensive force is used "was in the process of unlawfully and forcefully entering, *or had unlawfully and forcibly entered*, a home," and the person using defensive force knew or had reason to believe that "an unlawful and forcible entry . . . was occurring *or had occurred.*" N.C. Gen. Stat. § 14-51.2(b)(1)-(2) (emphases added).

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Viewed in the light most favorable to defendant, the evidence supports a jury instruction on the defense of habitation. Despite numerous requests to leave and multiple orders from law enforcement, Dockery continued to return to defendant's property while repeatedly threatening him with bodily harm. As the State acknowledges, it is undisputed that Dockery was within the curtilage of defendant's property—and therefore, within his home, N.C. Gen. Stat. § 14-51.2(a)(1)—when defendant utilized defensive force against him. Accordingly, we hold that the trial court erred by denying defendant's request for a jury instruction on the defense of habitation, N.C.P.I.–Crim. 308.80.

Furthermore, defendant was prejudiced by the trial court's failure to provide the requested instruction, because a person who uses permissible defensive force pursuant to N.C. Gen. Stat. § 14-51.2 "is justified in using such force and *is immune from civil or criminal liability* for the use of such force[.]" N.C. Gen. Stat. § 14-51.2(e) (emphasis added). Moreover, our Supreme Court has noted that a jury instruction on the common-law defense of habitation "would be more favorable to a defendant than would an instruction limited to self-defense." *McCombs*, 297 N.C. at 158, 253 S.E.2d at 911. This remains true pursuant to N.C. Gen. Stat. §§ 14-51.2 and 14-51.3. *See Lee*, \_\_ N.C. at \_\_, 811 S.E.2d at 566 ("The relevant distinction between the two statutes is that a rebuttable presumption arises that the lawful occupant of a home, motor vehicle, or workplace reasonably fears imminent death or serious bodily harm when using deadly force at those locations under the circumstances in [N.C. Gen. Stat.] § 14-51.2(b). This presumption does not arise in [N.C. Gen. Stat.] § 14-51.3(a)(1).").

### III. Conclusion

The trial court committed prejudicial error by failing to provide defendant's requested jury instruction on the defense of habitation, N.C.P.I.–Crim. 308.80. Therefore, we reverse the judgment entered upon the jury's verdict finding defendant guilty of voluntary manslaughter and remand for a new trial. Because we have reversed and remanded for a new trial, we need not address defendant's remaining arguments on appeal.

NEW TRIAL.

Judges DAVIS and TYSON concur.

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[260 N.C. App. 289 (2018)]

STATE OF NORTH CAROLINA

v.

GEORGE LEE NOBLES

No. COA17-516

Filed 3 July 2018

**1. Native Americans—jurisdiction—Qualla Boundary—non-Cherokee defendant**

The federal Indian Major Crimes Act normally preempts state criminal jurisdiction when an Indian (using the statutory term) commits an enumerated major crime in the Qualla Boundary of the Eastern Band of Cherokee Indians.

**2. Native Americans—Cherokee—status as Indian—criminal jurisdiction**

Qualification as an Indian under the federal Indian Major Crimes Act is an issue of first impression in North Carolina and the Fourth Circuit. Federal Courts of Appeal use a two-pronged test under *United States v. Rogers*, 45 U.S. 567 (1846). Neither party disputed that the first prong of *Rogers* was satisfied in this case because defendant had sufficient Indian blood.

**3. Native Americans—jurisdiction—Cherokee—determination of status—recognition by tribe**

For criminal jurisdiction purposes, the determination of whether a person is a member of the Eastern Band of Cherokee Indians involves a two-pronged test under *United States v. Rogers*, 45 U.S. 567 (1846). There is a split in federal circuits on assessing the second prong—recognized as an Indian by a tribe or the federal government. Defendant would not qualify as an Indian under either test and the trial court did not err by denying his motion to dismiss a state court prosecution.

**4. Native Americans—jurisdiction—first descendants of enrolled tribal members**

A prior decision of the Eastern Band of Cherokee Indians to exercise its criminal tribal jurisdiction over first descendants of enrolled members implicated only one factor that may be used to satisfy the second prong of *United States v. Rogers*, 45 U.S. 567 (1846), for determining who is an Indian under the federal Indian Major Crimes Act. While it indicates a degree of tribal recognition,

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which is relevant, the *Rogers* test contemplates a balancing of multiple factors to determine Indian status.

**5. Native Americans—jurisdiction—test for Indian status**

The trial court properly determined that defendant did not satisfy the first prong of *St. Cloud v. United States*, 702 F. Supp. 1456 (1988), for determining Indian status. Defendant was not an enrolled member of the Eastern Band of Cherokee Indians but claimed First Descendant status; however, that status carried little weight because defendant was not classified as a First Descendant even though there was evidence that he would qualify for the designation.

**6. Native Americans—jurisdiction—status as Indian—receipt of assistance**

The trial court properly determined that a criminal defendant who claimed to be Cherokee did not satisfy the factor of receipt of assistance available only to members of a federally recognized tribe. Defendant received free health care services on five occasions when he was a minor, with the last instance approximately 22 years before his arrest.

**7. Native Americans—status as Indian—benefits of tribal affiliation—First Descendant status**

The trial court did not err by determining that a criminal defendant's evidence did not satisfy the factor for determining Indian status that he had received the benefits of affiliation with a federally recognized tribe. To the degree that defendant may have benefited from his First Descendant status and received free medical care when he was a minor 23 years earlier, it was irrelevant in light of the evidence that he never enjoyed any other tribal benefits based on his First Descendant status.

**8. Native Americans—jurisdiction—status as Indian—socially recognized affiliation with tribe**

The trial court properly determined that a criminal defendant's social and cultural connection with the Eastern Band of Cherokee Indians had little weight in determining his status as a Cherokee for purposes of criminal jurisdiction.

**9. Native Americans—findings—jurisdiction—status as Indian**

The trial court's findings and conclusions concerning a criminal defendant's status as a Cherokee were supported by sufficient evidence and the sufficiency of other findings were not addressed.

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Erroneous or irrelevant findings that did not affect the trial court's conclusions were not grounds for reversal.

**10. Native Americans—jurisdiction—state criminal—Indian status—no special instruction**

The trial court did not err by denying defendant's motion for a special instruction on the issue of his Indian status as it related to criminal jurisdiction. Defendant failed to adduce sufficient evidence to create a jury question on the issue.

**11. Constitutional Law—invocation of right to counsel—ambiguous**

The trial court properly denied defendant's motion to suppress statements made to police during a custodial interview after he invoked his right to counsel where defendant explicitly asked if he could consult with a lawyer. His invocation of his right to counsel was ambiguous considering the totality of the circumstances; moreover, he immediately initiated further communication with law enforcement.

**12. Criminal Law—motion for appropriate relief—dismissed without prejudice**

Defendant's motion for appropriate relief based on alleged constitutional violations was dismissed without prejudice to refile in superior court where the materials before the appellate court were not sufficient to make a determination.

**13. Judgments—clerical error—remanded**

A clerical error in an order arresting judgment in an action involving several offenses resulted in the matter being remanded for the correction of the order to accurately reflect the offense for which judgment was arrested.

Appeal by defendant from judgments entered 15 April 2016 by Judge Bradley B. Letts in Jackson County Superior Court. Heard in the Court of Appeals 21 March 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kathleen N. Bolton, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant.*

ELMORE, Judge.

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Defendant George Lee Nobles, a non-enrolled member of any federally recognized Native American<sup>1</sup> tribe but a first descendant of an enrolled member of the Eastern Band of Cherokee Indians (“EBCI”), appeals from judgments sentencing him to life in prison after a North Carolina jury convicted him of armed robbery, first-degree felony murder, and firearm possession by a felon.

He argues the trial court erred by (1) denying his motions to dismiss the charges on the grounds that the State of North Carolina lacked subject-matter jurisdiction to prosecute him because he is an “Indian” and thus criminal jurisdiction lie exclusively in federal court under the Indian Major Crimes Act (“IMCA”), 18 U.S.C. § 1153 (2013); (2) denying his request to submit the question of his Indian status to the jury for a special verdict on subject-matter jurisdiction; and (3) denying his motion to suppress incriminating statements he made to police during a custodial interview after allegedly invoking his right to counsel. Defendant has also (4) filed a motion for appropriate relief (“MAR”) with this Court, alleging that his convictions were obtained in violation of his constitutional rights. Finally, defendant (5) requests we remand the matter to the trial court with instructions to correct a clerical error in its order arresting judgment on the armed-robbery conviction, since although that order lists the correct file number of 12 CRS 1363, it lists the wrong offense of firearm possession by a felon.

As to the first three issues presented, we hold there was no error. As to the MAR, we dismiss the motion without prejudice to defendant’s right to file a new MAR in the superior court. As to the clerical error, we remand the matter to the trial court with instructions to correct its order by listing the accurate offense of armed robbery.

***I. Background***

On 30 September 2012, Barbara Preidt, a non-Indian, was robbed at gunpoint and then fatally shot outside the Fairfield Inn in the Qualla Boundary, land held in trust by the United States for the EBCI. On 30 November 2012, officers of the Cherokee Indian Police Department arrested defendant, Dwayne Edward Swayney, and Ashlyn Carothers for Preidt’s robbery and murder. Soon after, tribal, federal, and state prosecutors conferred together to determine which charges would be brought and in which sovereign government criminal jurisdiction was proper for each defendant. After discovering that Swayney was an enrolled tribal

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1. While we use the terms “Native American” and “Indian” interchangeably, we often use “Indian” to comport with the language used in the federal statute at issue in this case.

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member of the EBCI, and that Carothers was an enrolled tribal member of the Cherokee Nation of Oklahoma, authorities brought these two defendants before an EBCI tribal magistrate. After discovering that defendant was not an enrolled member of any federally recognized tribe, the three sovereignties agreed that North Carolina would exercise its criminal jurisdiction to prosecute him, and authorities brought defendant before a Jackson County magistrate, charging him with armed robbery, murder, and firearm possession by a felon.

In August 2013, defendant moved to dismiss those charges for lack of jurisdiction. He argued North Carolina lacked subject-matter jurisdiction because he was an Indian, and thus the offenses were covered by the IMCA, which provides for exclusive federal jurisdiction over “major crimes” committed by “Indians” in “Indian Country.” See 18 U.S.C. § 1153. After a two-day pretrial jurisdictional hearing, the state trial court judge, applying a Ninth Circuit test to determine if someone qualifies as an Indian for purposes of criminal jurisdiction, see *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005), concluded in a detailed forty-two page order entered on 26 November 2013 that defendant was not an Indian and thus denied defendant’s motion to dismiss for lack of subject-matter jurisdiction. On 18 December 2013, the trial court granted defendant’s motion to stay criminal proceedings pending resolution of his appeal from its 26 November 2013 order. On 30 January 2014, defendant petitioned our Supreme Court for *certiorari* review of that order, which it denied on 11 June 2014. On 23 June 2014, the trial court dissolved the stay.

In March 2016, defendant moved to suppress incriminating statements he made to police during a custodial interview, which the trial court denied by an order entered *nunc pro tunc* on 24 March. Also in March, defendant renewed his motion to dismiss the charges for lack of state criminal jurisdiction and moved, alternatively, to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction. By another order entered *nunc pro tunc* on 24 March, the trial court denied both motions, reaffirming its prior ruling that criminal jurisdiction properly lie in North Carolina, and concluding that a special instruction to the jury on defendant’s Indian status as it implicated North Carolina’s subject-matter jurisdiction was unwarranted.

From 28 March until 15 April 2016, defendant was tried in Jackson County Superior Court, yielding jury convictions of armed robbery, first-degree felony murder, and firearm possession by a felon. The trial court arrested judgment on the armed-robbery conviction; entered a

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judgment on the murder conviction, sentencing defendant to life imprisonment without parole; and entered another judgment on the firearm-possession-by-a-felon conviction, sentencing defendant to an additional fourteen to twenty-six months in prison. Defendant appeals.

**II. Arguments**

On appeal, defendant asserts the trial court erred by (1) denying his motions to dismiss the state-law charges for lack of subject-matter jurisdiction because North Carolina was preempted from prosecuting him under the IMCA; (2) denying his request to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction because he presented sufficient evidence at the jurisdictional hearing from which a jury could find that he is an Indian, and he thus raised a factual issue as to jurisdiction; and (3) denying his motion to suppress the incriminating statements he made to police during his custodial interview because he invoked his right to counsel. Defendant also asserts (4) the case must be remanded to correct a clerical error.

**III. Denial of Motion to Dismiss**

Defendant first asserts the State of North Carolina lacked criminal jurisdiction to prosecute him because he is an “Indian” and thus the IMCA applied to preempt state criminal jurisdiction. *See* 18 U.S.C. § 1153 (providing for exclusive federal jurisdiction when an “Indian” commits certain enumerated “major crimes” in “Indian Country”). The State asserts North Carolina enjoys concurrent criminal jurisdiction over all crimes committed in the Qualla Boundary, regardless of whether a defendant is an Indian. Alternatively, the State argues that even if the IMCA would preempt North Carolina from exercising criminal jurisdiction over these major crimes if they occurred in the Qualla Boundary, it is inapplicable here because defendant is not an “Indian.”

**A. Review Standard**

“Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal.” *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012) (citing *State v. Abbott*, 217 N.C. App. 614, 616, 720 S.E.2d 437, 439 (2011)).

**B. IMCA Preempts State Criminal Jurisdiction**

[1] The State first argues that Fourth Circuit and North Carolina precedent establishes that “North Carolina at least has concurrent criminal jurisdiction over the Qualla Boundary without regard to whether the defendant is an Indian or non-Indian.” Among other distinguishing

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reasons, those cases<sup>2</sup> are not controlling because they were decided before *United States v. John*, 437 U.S. 634, 98 S. Ct. 2541 (1978) (holding that the State of Mississippi lacked criminal jurisdiction over a Choctaw Indian for a major crime committed on the Choctaw Reservation pursuant to the IMCA, regardless of Choctaw Indians' dual status as citizens of Mississippi and members of a federally recognized Indian tribe). *Cf. Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373, 380 (4th Cir. 1980) (relying on *John's* rationale to hold that, although EBCIs enjoy dual status as "citizens of North Carolina and Indians living on a federally held reservation," North Carolina lacked authority to impose an income tax on EBCI tribal members who derived their income from activities on the reservation).

"[T]he exercise of state-court jurisdiction . . . is preempted by federal law. . . . upon a showing of congressional intent to 'occupy the field' and prohibit parallel state action." *Jackson Cty. v. Swayney*, 319 N.C. 52, 56, 352 S.E.2d 413, 415–16 (1987) (citations omitted). The IMCA provides in pertinent part:

(a) Any *Indian* who commits against . . . [any] other person . . . murder, . . . [or] robbery[ ] . . . within . . . Indian country, *shall be subject* to the same law and penalties as all other persons committing any of the above offenses, within *the exclusive jurisdiction of the United States*.

18 U.S.C. § 1153(a) (emphasis added). This language demonstrates clear Congressional intent for "exclusive" federal criminal jurisdiction ousting parallel state action when the IMCA applies. *See Negonsott v. Samuels*, 507 U.S. 99, 102–03, 113 S. Ct. 1119, 1121–22 (1993) ("As the text of § 1153[ ] . . . and our prior cases make clear, federal jurisdiction over the offenses covered by the [IMCA] is 'exclusive' of state jurisdiction." (citations omitted)); *see also John*, 437 U.S. at 651, 98 S. Ct. at 2550 (affirming that "§ 1153 ordinarily is pre-emptive of state jurisdiction when it applies").

Accordingly, when an "Indian" commits one of the enumerated "major crimes" in the "Indian Country" of the Qualla Boundary, the IMCA would ordinarily oust North Carolina's criminal jurisdiction. Murder and armed robbery are "major crimes" under the IMCA, and the offenses here were committed in undisputed "Indian Country." *See Lynch*, 632 F.2d at 380. At issue is whether defendant qualifies as an "Indian," such

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2. *United States v. Hornbuckle*, 422 F.2d 391 (4th Cir. 1970) (per curiam); *State v. McAlhaney*, 220 N.C. 387, 17 S.E.2d 352 (1941); *State v. Ta-Cha-Na-Tah*, 64 N.C. 614 (1870).

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that the IMCA applied to preempt North Carolina from exercising its state criminal jurisdiction.

**C. The *Rogers* Test**

[2] Defendant claims Indian status with the EBCI. Both parties concede the issue of whether someone qualifies as an Indian under the IMCA is an issue of first impression for both the Fourth Circuit and our state appellate courts. While the ICMA does not explicate who qualifies as an “Indian” for federal criminal jurisdiction purposes, to answer this question federal circuit courts of appeal employ a two-pronged test suggested by *United States v. Rogers*, 45 U.S. 567, 573, 11 L. Ed. 1105 (1846). To satisfy the first prong, a defendant must have some Indian blood; to satisfy the second, a defendant must be recognized as an Indian by a tribe and/or the federal government. *See, e.g., United States v. Zepeda*, 792 F.3d 1103, 1106–07 (9th Cir. 2015) (en banc) (interpreting *Rogers* as requiring the “government [to] prove that the defendant (1) has some quantum of Indian blood and (2) is a member of, or is affiliated with, the federally recognized tribe”); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (“The [IMCA] does not define Indian, but the generally accepted test—adapted from . . . *Rogers*[ ] . . . —asks whether the defendant (1) has some In-dian blood, and (2) is recognized as an Indian by a tribe or the federal government or both.”). Here, the trial court found, and neither party disputes, that *Rogers*’ first prong was satisfied because defendant has an Indian blood quantum of 11/256 or 4.29%. At issue is *Rogers*’ second prong.

[3] While the Fourth Circuit has not addressed how to apply *Rogers* to determine whether someone qualifies as an Indian, there is a federal circuit split in assessing *Rogers*’ second prong. The Ninth Circuit considers only the following four factors and “in declining order of importance”:

(1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.

*Zepeda*, 792 F.3d at 1114. The Eighth Circuit also considers these factors but assigns them no order of importance, other than tribal enrollment which it deems dispositive of Indian status, and allows for the

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consideration of other factors, such as whether a defendant has been subjected to tribal court jurisdiction and whether a defendant has held himself out as an Indian. *See Stymiest*, 581 F.3d at 763–66.

Here, the trial court applied the Ninth Circuit’s test and determined defendant was not an Indian for criminal jurisdiction purposes. Because defendant would not qualify as an Indian under either test, we find no error in the trial court’s denial of his motion to dismiss. *Cf. State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (“A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable.” (citing *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957))).

**D. Rogers’ Second Prong**

[4] *Rogers*’ second prong “asks whether the defendant . . . is recognized as an In-dian by a tribe or the federal government or both.” *Styimiest*, 581 F.3d at 762. Defendant first argues he satisfied this prong as a matter of law because he presented evidence that he is a first descendant of an enrolled member of the EBCI, and the EBCI recognizes all first descendants as Indians for purposes of exercising tribal criminal jurisdiction.

Defendant relies on the Cherokee Court of the EBCI’s decision in *Eastern Band of Cherokee Indians v. Lambert*, No. CR 03-0313, 2003 WL 25902446, at \*2–3 (EBCI Tribal Ct. May 29, 2003) (holding that the EBCI had tribal criminal jurisdiction over a non-enrolled first descendant), and its subsequent decisions interpreting *Lambert* as “[h]olding that First Lineal Descendants are Indians for the purposes of the exercise of this Court’s [tribal criminal] jurisdiction,” *Eastern Band of Cherokee Indians v. Prater*, No. CR 03-1616, 2004 WL 5807679, at \*1 (EBCI Tribal Ct. Mar. 18, 2004); *see also In re Welch*, No. SC 03-13, 2003 WL 25902440, \*4 (EBCI Tribal Ct. Oct. 31, 2003) (interpreting *Lambert* as holding that “first lineal descendants, children of enrolled members who do not possess sufficient blood quanta to qualify for enrollment themselves[,] are nevertheless subject to the criminal jurisdiction of the Court”). Additionally, defendant relies on Rule 6 of the Cherokee Rules of Criminal Procedure that instructs tribal magistrates when determining jurisdiction that tribal criminal jurisdiction exists if a suspect is a first descendant. *See Cherokee Code* § 15-8, Rule 6(b).

The State argues in relevant part that even if the EBCI recognizes all first descendants as Indians for purposes of exercising its tribal criminal jurisdiction, this is only one factor to consider when assessing *Rogers*’ second prong. We agree.

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While exercising tribal criminal jurisdiction over first descendants reflects a degree of tribal recognition, the Ninth Circuit has determined that “enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status.” *Bruce*, 394 F.3d at 1225. As tribal enrollment has been declared insufficient to satisfy *Rogers*’ second prong as a matter of law, it follows that the exercise of criminal tribal jurisdiction over first descendants is also insufficient. *Cf. United States v. Cruz*, 554 F.3d 840, 851 (9th Cir. 2009) (“[A] showing that a tribal court on one occasion may have exercised jurisdiction over a defendant is of little if any consequence in satisfying the [Indian] status element [beyond a reasonable doubt] in a § 1153 prosecution.”). As the Ninth Circuit’s application of the *Rogers* test contemplates a balancing of multiple factors to determine Indian status, we reject defendant’s argument that the EBCI’s decision to exercise its criminal tribal jurisdiction over first descendants satisfies *Rogers*’ second prong as a matter of law.

**E. *St. Cloud* Factors**

Alternatively, defendant argues, he satisfied *Rogers*’ second prong under the Ninth Circuit’s test as applied by the trial court. In *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988), the Central Division of the United States District Court of South Dakota set forth four factors to be considered in declining order of importance when evaluating *Rogers*’ second prong. The Ninth Circuit adopted these “*St. Cloud*” factors, *see Bruce*, 394 F.3d at 1223, and its later *en banc* articulation of its test instructs that “the criteria are, in declining order of importance”:

(1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.

*Zepeda*, 792 F.3d at 1114.

**1. *First St. Cloud Factor***

**[5]** The first and most important *St. Cloud* factor asks whether a defendant is an enrolled member of a federally recognized tribe. *Id.* Here, the trial court found, and defendant concedes, he is not an enrolled tribal

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member of the EBCI or any federally recognized tribe, nor is he eligible to become an enrolled member of the EBCI, as his 4.29% Indian blood quantum fails to satisfy the minimum 16% necessary for enrollment.

Nonetheless, defendant argues, this factor weighs in his favor because “he has been afforded a special status as a First Descendant.” The Ninth Circuit has stated that while descendant status “does not carry similar weight to enrollment, and should not be considered determinative, it reflects some degree of recognition.” *United States v. Maggi*, 598 F.3d 1073, 1082 (9th Cir. 2010), *overruled on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015). However, we find defendant’s first descendant status carries little weight in this case.

First descendants are eligible for certain tribal benefits unavailable to non-members or members of other tribes. While the evidence showed that defendant would qualify for designation as a first descendant, it also showed that he is not classified by the EBCI as a first descendant, and he is thus currently ineligible to receive those benefits. The trial court’s unchallenged findings established that individuals designated as first descendants are issued a “Letter of Descent” by the EBCI tribal enrollment office, which is used to establish eligibility for first descendant benefits, and that no “Letter of Descent” for defendant was found after a search of the official documents in the tribal enrollment office. *Cf. Cruz*, 554 F.3d at 847 (concluding that “mere eligibility for benefits is of no consequence under [the *St. Cloud* factors]” and rejecting “the dissent’s argument that mere descendant status with the concomitant eligibility to receive benefits is effectively sufficient to demonstrate ‘tribal recognition’”). Accordingly, the trial court properly determined the evidence presented failed to satisfy the first *St. Cloud* factor.

2. *Second St. Cloud Factor*

[6] The second *St. Cloud* factor asks whether a defendant has been recognized by the government “through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes.” *Zepeda*, 792 F.3d at 1114. Defendant argues this factor was satisfied because he received health care services reserved only for Indians. The record evidence indicated that defendant received free health care services on five occasions—31 October 1985, 1 October 1987, 12 March 1989, 16 March 1989, and 28 February 1990—from the Cherokee Indian Hospital (“CIH”), which at the time was a federally funded Indian Health Service (“IHS”).

Applying this evidence to the second *St. Cloud* factor, the trial court found:

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264. . . . [U]nder the second *St. Cloud* factor the only evidence of government recognition of the Defendant as an Indian is the receipt of medical services at the CIH. The Federal government through the Indian Health Service provide[s] benefits reserved only to Indians arising from the unique trust relationship with the tribes. Also, the government of the Eastern Band of Cherokee provides additional health benefits to the enrolled members. The only evidence Defendant presents of the receipt of health services available only to Indians is medical care at the CIH more than two decades ago as documented in his medical chart. While it is true that he did receive care from the CIH it is likewise true he sought acute care, this care was when he was a minor and he was taken for treatment by his mother. Since becoming an adult he has never sought further medical care from the providers in Cherokee. Moreover, the last time he sought care from the CIH was over 23 years ago.

. . . .

266. [E]xcept for the five visits to the CIH, there is no other evidence Defendant received any services or assistance reserved only to individuals recognized as Indian under the second *St. Cloud* factor.

Defendant relies on *United States v. LaBuff*, 658 F.3d 873 (9th Cir. 2011), to argue that receipt of free health care services from an IHS satisfies the second *St. Cloud* factor. *LaBuff* is distinguishable because the defendant there, “since 1979, . . . was seen at the Blackfeet Community Hospital for Well Child care services, walk-in visits, urgent care, and mental health assistance[,]” and “since 2009, [he] sought medical care approximately 10 to 15 times.” *Id.* at 879 n.8. Here, defendant only sought medical care from the CIH five times when he was a minor, his last visit occurring approximately twenty-two years before he was arrested on the charges at issue in this case. *Cf. Zepeda*, 792 F.3d at 1113 (“In a prosecution under the IMCA, the government must prove that the defendant was an Indian *at the time of the offense* with which the defendant is charged.” (emphasis added)). The trial court properly determined this evidence failed to sufficiently satisfy the second *St. Cloud* factor.

### 3. *Third St. Cloud Factor*

[7] The third *St. Cloud* factor asks whether a defendant has “enjoy[ed] . . . the benefits of affiliation with a federally recognized tribe.” *Zepeda*,

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792 F.3d at 1114. Defendant argues he satisfied this factor based on the same five CIH visits when he was a minor.

As to this third factor, the trial court found:

267. . . . [U]nder the third *St. Cloud* factor the Court must examine how Defendant has benefited from his affiliation with the Eastern Band of Cherokee. The Defendant suggests he has satisfied the third factor under the *St. Cloud* test in that Cherokee law affords special benefits to First Descendants. To be sure the Cherokee Code as developed over time since the ratification of the 1986 Charter and Governing Document does afford special benefits and opportunities to First Descendants. *Whilst it is accurate the Cherokee Code is replete with special provisions for First Descendants in areas of real property, education, health care, inheritance, employment and access to the Tribal Court, save however for use of medical services a quarter of a century ago Defendant has not demonstrated use of any of his rights as a First Descendant of the Eastern Band of Cherokee.*

268. . . . [T]he third *St. Cloud* factor is ‘enjoyment’ of the benefits of tribal affiliation. *Enjoyment connotes active and affirmative use. Such is not the case with Defendant. Defendant directs the undersigned to no positive, active and confirmatory use of the special benefits afforded to First Descendants.* Defendant has never ‘enjoyed’ these opportunities which were made available for individuals similarly situated who enjoy close family ties to the Cherokee tribe. Rather, Defendant merely presents the Cherokee Code and asks the undersigned to substitute opportunity for action. To ascribe enjoyment of benefits where none occurred would be tantamount to finding facts where none exist.

(Emphasis added.)

In his brief, defendant challenges the following factual finding on this factor:

275. . . . [A]ccordingly after balancing all the evidence presented to the undersigned using the *Rogers* test and applying the *St. Cloud* factors in declining order of importance, . . . while Defendant does have, barely, a small degree of

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Indian blood he is not an enrolled member of the Eastern Cherokee, never benefited from his special status as a First Descendant and is not recognized as an Indian by the Eastern Band of Cherokee Indians, any other federally recognized Indian tribe or the federal government. Therefore, the Defendant for purposes of this motion to dismiss is not an Indian.

Specifically, defendant challenges as unsupported by the evidence the part of this finding that he “never benefited from his special status as a First Descendant and is not recognized as an Indian by the EBCI . . . or the federal government” because he was recognized by the federal government when he was benefited from his first descendant status by receiving federally-funded services from an IHS. To the degree defendant may have benefited from his first descendant status and was recognized by the federal government by receiving free medical care from the CIH on those five instances last occurring when he was a minor twenty-three years before the hearing, we conclude it is irrelevant in assessing this factor in light of the absence of evidence that defendant enjoyed any other tribal benefits he may have been eligible to receive based on his first descendant status. Accordingly, the trial court properly determined this evidence failed to satisfactorily satisfy the third *St. Cloud* factor.

4. *Fourth St. Cloud Factor*

[8] The fourth and least important *St. Cloud* factor asks whether a defendant is “social[ly] recogni[z]ed as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.” *Zepeda*, 792 F.3d at 1114. Defendant asserts he satisfied this factor because he “lived on or near the Qualla Boundary for significant periods of time,” attended Cherokee schools as a minor, and, after leaving prison in Florida in 2011, he “returned to living on or near the Qualla Boundary, often with enrolled tribal members,” “got a job on the reservation, and lived on the reservation with Carothers, a member of another tribe.” Defendant also argues his two tattoos—an eagle and a Native American wearing a headdress—“show an attempt to hold himself out as an Indian.”

As to this factor, the trial court issued, *inter alia*, the following finding:

271. . . . [T]he Defendant simply has no ties to the Qualla Boundary. . . . [U]nder the fourth *St. Cloud* factor Defendant points to no substantive involvement in the fabric of the Cherokee Indian community at any time. The Defendant

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did reside and work on or near the Cherokee reservation for about 14 months when his probation was transferred from Florida to North Carolina. Yet in these 14 months near Cherokee the record is devoid of any social involvement in the Cherokee community by the Defendant.

While the record evidence showed defendant returned to the Qualla Boundary in 2011 for about fourteen months, resided on or near the Qualla Boundary with an enrolled member of another tribe, and worked for a restaurant, Homestyle Fried Chicken, located within the Qualla Boundary, no evidence showed he participated in EBCI cultural or social events, or in any EBCI religious ceremonies during that time.

Myrtle Driver Johnson, a sixty-nine-year old enrolled EBCI member who has lived on the Qualla Boundary her entire life and was bestowed the honor of “Beloved Woman” by tribal leaders for her dedication and service to the EBCI, testified about EBCI social and cultural life, and EBCI religious ceremonies. The trial court’s unchallenged findings establish that Johnson is “richly versed in the history of the Eastern Cherokee” and “deeply involved in and a leader of the Cherokee community regarding the language, culture and tradition of the [EBCI].” Johnson testified she participated in various EBCI social and cultural events and ceremonies on the Qualla Boundary over the years and was unfamiliar with defendant or his enrolled mother. Johnson also testified about the potential EBCI cultural symbolism of defendant’s tattoos, opining that “[a]ll Native American Tribes honor the eagle” and it thus represented nothing unique to the EBCI, and that the headdress depicted on defendant’s tattoo was worn not by the Cherokee but by “western plains Native Americans.” The trial court properly determined this evidence carried little weight under the fourth *St. Cloud* factor.

**F. Sufficiency of Factual Findings**

[9] Defendant also challenges the evidentiary sufficiency of ten of the trial court’s 278 factual findings, and eight subsections of another finding. However, most of those findings either recite the absence of evidence pertaining to defendant’s tribal affiliation with the EBCI as to assessing his Indian status under *Rogers*, or were based on probation documents indicating defendant’s race was “white/Caucasian,” which were presented after the jurisdictional hearing. Erroneous or irrelevant findings that do not affect the trial court’s conclusions are not grounds for reversal. *See, e.g., State v. Hernandez*, 170 N.C. App. 299, 305, 612 S.E.2d 420, 424 (2005) (“[A]n order ‘will not be disturbed because of . . . erroneous findings which do not affect the conclusions.’” (citation

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omitted)); *Goodson v. Goodson*, 145 N.C. App. 356, 360, 551 S.E.2d 200, 204 (2001) (“[I]rrelevant findings in a trial court’s decision do not warrant a reversal of the trial court.” (citations omitted)). Because we conclude the trial court’s other factual findings adequately supported its conclusions, we decline to address the sufficiency of those findings.

**G. Conclusion**

Because the evidence presented did not demonstrate that defendant is an “Indian” or that he sufficiently satisfied any of the *St. Cloud* factors, the trial court properly concluded defendant did not qualify as an Indian for criminal jurisdiction purposes when applying the Ninth Circuit’s test. Accordingly, the trial court properly denied defendant’s motion to dismiss the charges for lack of jurisdiction.

**IV. Denial of Motion for Special Jury Verdict**

[10] Defendant next asserts the superior court erred by denying his pretrial motion to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction.

“[W]hen jurisdiction is challenged[ ] . . . the State must carry the burden [of proof] and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused.” *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502–03 (1977). In the territorial jurisdiction context, our Supreme Court has explained:

When jurisdiction is challenged, the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an ‘independent, distinct, substantive matter of exemption, immunity or defense’ and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested*, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment.

*Id.* at 493, 238 S.E.2d at 502 (internal citation omitted); *see also State v. Rick*, 342 N.C. 91, 100–01, 463 S.E.2d 182, 186 (1995) (“[T]he State, when jurisdiction is challenged, [is required] to prove beyond a reasonable doubt that the crime with which defendant is charged occurred in North Carolina.” (citing *Batdorf*, 293 N.C. at 494, 238 S.E.2d at 502–03); other citation omitted)). However, unless sufficient evidence is adduced to create a jury question on jurisdiction, “a jury instruction regarding jurisdiction is not warranted.” *State v. White*, 134 N.C. App. 338, 340,

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517 S.E.2d 664, 666 (1999) (citation omitted). The “preliminary determination that sufficient evidence exists” to create a jury question on the factual basis of jurisdiction is a question of law for the court. *Rick*, 342 N.C. at 100–01, 463 S.E.2d at 187 (citations omitted).

Here, defendant filed a pretrial motion to dismiss the charges against him for lack of state criminal jurisdiction. But his motion was grounded not in a challenge to North Carolina’s territorial jurisdiction, but in a challenge to its subject-matter jurisdiction, based on his claim that he was an Indian. After the pretrial jurisdictional hearing, the trial court entered an order denying defendant’s motion on the basis that defendant was not an Indian for criminal jurisdiction purposes and the State therefore satisfied its burden of proving jurisdiction beyond a reasonable doubt. Upon defendant’s renewed jurisdictional motion to dismiss or, in the alternative, to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction, the trial court entered another order denying both motions.

In this second order, the trial court reaffirmed its prior ruling that North Carolina had criminal jurisdiction and thus denied the renewed jurisdictional motion to dismiss on that basis. As to defendant’s alternative motion for a special jurisdictional instruction to the jury, the trial court concluded that because the crimes undisputedly occurred within North Carolina, and the only special instruction on jurisdiction concerned territorial jurisdiction, such an instruction was unwarranted. As to defendant’s specific request that his Indian status be submitted to the jury, the trial court concluded that because it “already determined the Defendant is not an Indian for purposes of criminal jurisdiction” and “there exists no requirement that in order to convict the Defendant in the North Carolina state court of murder the State must prove beyond a reasonable doubt that the defendant is an Indian,” submitting that issue to the jury was unwarranted. We conclude the trial court did not err in denying defendant’s motion for a special instruction on the issue of his Indian status as it related to state criminal jurisdiction.

Defendant’s cited authority concerns factual matters implicating territorial jurisdiction, not subject-matter jurisdiction. Unlike IMCA prosecutions, under which Indian status is a jurisdictional prerequisite that the Government must prove beyond a reasonable doubt, *see Zepeda*, 792 F.3d at 1110 (“Under the IMCA, ‘the defendant’s Indian status is an essential element . . . which the government must allege in the indictment and prove beyond a reasonable doubt.’ ” (quoting *Bruce*, 394 F.3d at 1229)), neither have our General Statutes nor our state appellate court decisions burdened the State when prosecuting major state-law crimes

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that occurred in Indian Country to prove a defendant is *not* an Indian beyond a reasonable doubt. But even if the State had such a burden, in this particular case, we conclude defendant failed to adduce sufficient evidence to create a jury question on his Indian status.

The record evidence established that defendant failed to satisfy the first and most important *St. Cloud* factor of tribal enrollment, or even eligibility for tribal enrollment. While defendant presented evidence that on five instances during his childhood he received free health care based on his first descendant status, he presented no evidence he received or enjoyed any other tribal benefits based on that status. Indeed, the evidence showed that while defendant would qualify to be designated by the EBCI as a first descendant for purposes of receiving such benefits, he was not currently recognized by the EBCI as a first descendant based on his failure to apply for and obtain a “Letter of Descent.” While defendant returned to living on or near the Qualla Boundary in 2011 for fourteen months, he presented no evidence that during that time he was involved in any EBCI cultural or social activities or events or activities, or any EBCI religious ceremonies. Finally, while defendant is tattooed with an eagle and a Native American wearing a headdress, the State presented evidence that the EBCI affords no unique significance to the eagle, and that headdress was never worn during any EBCI ritual or tradition but was worn by western plain Native Americans.

Based on defendant’s showing at the jurisdictional hearing, we conclude he failed to adduce sufficient evidence to create a jury question as to whether he qualifies as an Indian for criminal jurisdiction purposes. Accordingly, the trial court properly denied defendant’s motion to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction.

***V. Denial of Motion to Suppress***

**[11]** Defendant contends the trial court erred by denying his motion to suppress incriminating statements he made to police during a custodial interview after allegedly invoking his constitutional right to counsel.

Our review of a trial court’s denial of a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Conclusions of law are reviewed *de novo*. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted).

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The objective standard used to determine whether a custodial suspect has unambiguously invoked his right to counsel is whether “a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355 (1994). “But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.” *Id.* (citing *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209 (1991)). For instance, “if a suspect is ‘indecisive in his request for counsel,’ the officers need not always cease questioning.” *Id.* at 460, 114 S. Ct. at 2356 (quoting *Miranda v. Arizona*, 384 U.S. 436, 485, 86 S. Ct. 1602, 1633 (1966)).

Further, even if a suspect unambiguously invokes his right to counsel during a custodial interview, “he is not subject to further questioning until a lawyer has been made available *or the suspect himself reinitiates conversation.*” *Id.* at 458, 114 S. Ct. at 2354–55 (emphasis added) (citing *Edwards v. Arizona*, 451 U.S. 477, 484–85, 101 S. Ct. 1880, 1884–85 (1981)); *see also Edwards*, 451 U.S. at 484–85, 101 S. Ct. at 1885 (“[A]n accused . . . [after invoking his right to counsel], is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*” (emphasis added)).

Here, the trial court found, unchallenged on appeal, that before his custodial interview, defendant “was advised and read his *Miranda* . . . rights,” that he “initialed and signed the *Miranda* rights form,” that he “understood his *Miranda* rights and at no time subsequent to the commencement of the interview indicated he failed to understand his *Miranda* rights,” and that he “then waived his *Miranda* rights and spoke with law enforcement.” The trial court also issued the following unchallenged and thus binding findings:

80. In this case Defendant said “Can I consult with a lawyer, I mean, or anything? I mean, I-I - I did it. I’m not laughing, man, I want to cry because it’s f[\*]cked up to be put on the spot like this.”

81. Applying an objective standard in analyzing the statement of Defendant, the undersigned finds there never was an assertion of a right but rather simply a question. Further, Defendant did not stop talking after asking the

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question to allow law enforcement to respond. Defendant did not cease talking or refuse to answer more questions but rather continued talking to investigators for the entirety of the interview. The undersigned determines that no assertion of a right to counsel was made by Defendant.

....

83. This ambiguous statement by Defendant fails to support a finding that *Miranda* rights were asserted.

84. Furthermore, the undersigned has also examined the claimed request for counsel by Defendant in the context of the questions posed and answers given both before and after page 58. Again, with the expanded examination of the statement made by Defendant and considering the context of that section of the interview, Defendant also fails to objectively establish he unequivocally and unambiguously invoked his *Miranda* rights to counsel.

85. Reviewing the entire transcript, the Defendant asked about the attorney as a question on page 58. Law enforcement clearly and appropriately answered the question posed. Most telling, Det. Iadonisi in response told Defendant he had a right to have an attorney followed immediately by SBI Agent Oaks further clarifying and explaining that law enforcement can never make the decision to invoke *Miranda* rights for a defendant. After answering Defendant's question, explaining he did have and continued to possess *Miranda* rights and that no person except Defendant could elect to assert and invoke *Miranda* rights, the Defendant continued to talk to law enforcement.

86. With further import, it is essential to note that for the entire remainder of the interview the Defendant never again mentioned an attorney or told law enforcement he wished to stop talking.

Our review of the video recording of defendant's interrogation comports with the trial court's findings and its ultimate conclusion that defendant's statements were not obtained in violation of his constitutional rights. Merely one-tenth of a second elapsed between the time that defendant asked, "[c]an I consult with a lawyer, I mean, or anything?" and then stated, "I mean I – I – I did it. I'm not laughing man, I

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want to cry because its f[\*]cked up to be put on the spot like this.” The officers then immediately reminded defendant of his *Miranda* rights, that they had just read him those rights, that defendant “ha[d] the right to have [his attorney] here,” and that the officers “[could] never make that choice for [him] one way or another.” After police attempted to clarify whether defendant’s question was an affirmative assertion of his *Miranda* rights, defendant declined to unambiguously assert that right, continued communications, and never again asked about counsel for the rest of the interview.

Although defendant explicitly asked if he could consult with a lawyer, considering the totality of the circumstances, we agree that defendant’s invocation of his *Miranda* rights was ambiguous or equivocal, such that the officers were not required to cease questioning. Defendant did not pause between the time he asked for counsel and gave his initial confession, the officers immediately reminded defendant of his *Miranda* rights to clarify if he was indeed asserting his right to counsel, and defendant declined the offered opportunity to unambiguously assert that right but instead continued communicating with the officers. Even if defendant’s question could be objectively construed as an unambiguous invocation of his *Miranda* rights, it was immediately waived when he initiated further communication. Accordingly, the trial court properly denied defendant’s motion to suppress.

**VI. Motion for Appropriate Relief**

**[12]** After defendant’s appeal was docketed, he filed a motion for appropriate relief (“MAR”) with this Court. *See* N.C. Gen. Stat. § 15A-1418(a) (2017) (authorizing the filing of MARs in the appellate division). Section 15A-1418(b), governing the disposition of MARs filed in the appellate division, provides in relevant part that “[w]hen a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings[.] . . .” *Id.* § 15A-1418(b) (2017).

Defendant’s MAR is primarily grounded in a claim that his convictions were obtained “in violation of the Constitution of the United States or the Constitution of North Carolina.” *See* N.C. Gen. Stat. § 15A-1415(b)(3) (2017). Where, as here, “[t]he materials before [our appellate courts] are not sufficient for us to make that determination,” our Supreme Court has instructed that despite section 15A-1418(b)’s “suggest[ion] that the motion be remanded to the trial court for hearing and determination, . . .

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the better procedure . . . is to dismiss the motion and permit defendant, if he so desires, to file a new motion for appropriate relief in the superior court.” *State v. Hurst*, 304 N.C. 709, 712, 285 S.E.2d 808, 810 (1982) (per curiam) (footnote omitted). Accordingly, we dismiss defendant’s motion without prejudice to his right to refile a new MAR in the superior court.

**VII. Clerical Error**

**[13]** Both parties agree the matter must be remanded to the trial court to correct a clerical error in an order. After the jury convicted defendant of first-degree felony murder in 12 CRS 51720, armed robbery in 12 CRS 1363, and firearm possession by a felon in 12 CRS 1362, the trial judge rendered an oral ruling arresting judgment on the armed-robbery conviction. The written order arresting judgment reflects the correct file number of 12 CRS 1363; however, it incorrectly lists the offense as “possess firearm by felon,” an offense for which defendant was separately sentenced. We remand the matter to the trial court for the sole purpose of correcting its order arresting judgment on 12 CRS 1363 to accurately reflect the offense of armed robbery.

**VIII. Conclusion**

Because the evidence presented at the jurisdictional hearing failed to satisfactorily satisfy any *St. Cloud* factor, the trial court properly concluded under the Ninth Circuit’s test that defendant does not qualify as an Indian for criminal jurisdiction purposes and thus properly denied defendant’s motions to dismiss the charges for lack of subject-matter jurisdiction. Because the evidence of defendant’s Indian status raised no reasonable factual jury question implicating the State’s burden of proving North Carolina’s criminal jurisdiction, the trial court properly refused defendant’s request to submit the issue of his Indian status to the jury for a special verdict on the matter of subject-matter jurisdiction. Because defendant’s incriminating statements were not obtained in violation of his constitutional rights, the trial court properly denied his motion to suppress. Accordingly, we conclude defendant received a fair trial, free of error. Additionally, because the materials before us are insufficient to decide defendant’s MAR, we dismiss his motion without prejudice to his right to file a new MAR in the superior court. Finally, we remand this matter to the trial court for the sole purpose of correcting the order arresting judgment on 12 CRS 1363 to accurately reflect the offense of armed robbery.

NO ERROR IN PART; DISMISSED IN PART; REMANDED IN PART.

Judges INMAN and BERGER concur.

**STATE v. PEREZ**

[260 N.C. App. 311 (2018)]

STATE OF NORTH CAROLINA

v.

JUAN CARLOS GOMEZ PEREZ

No. COA17-1147

Filed 3 July 2018

**Constitutional Law—Confrontation Clause—stipulation and waiver  
—admission of forensic laboratory report**

The trial court was not required to conduct a colloquy with defendant before allowing him, through counsel, to stipulate to the admission of multiple forensic laboratory reports identifying substances as cocaine, even though such stipulation acted as a waiver of defendant's constitutional rights, including the right to cross-examine witnesses.

Appeal by defendant from judgments entered 1 December 2016 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 2 May 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Melissa H. Taylor, for the State.*

*Paul F. Herzog for defendant.*

DIETZ, Judge.

Defendant Juan Carlos Gomez Perez appeals his convictions on multiple serious drug offenses. He argues that the trial court violated his Confrontation Clause rights and other related constitutional rights when the court permitted him to stipulate to the admission of a forensic laboratory report without first addressing him personally and ensuring that he understood the stipulation would waive those rights.

As explained below, the trial court was not required to personally address Perez about his stipulation and corresponding waiver. Both Perez and his counsel signed the stipulation. It is for his counsel—not the trial court—to discuss the strategic implications of that stipulation and the effect it has on his right to confront the witnesses against him. If Perez did not understand the implications of the stipulation, his recourse is to pursue a claim for ineffective assistance of counsel. Accordingly, we find no error in the trial court's judgments.

**STATE v. PEREZ**

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**Facts and Procedural History**

The State indicted Defendant Juan Carlos Gomez Perez for conspiracy to traffic by possession of 400 grams or more of cocaine, trafficking by possession of 400 grams or more of cocaine, and trafficking by transportation of 400 grams or more of cocaine. The charges stemmed from a drug task force investigation that intercepted a truck containing multiple “bricks” of cocaine.

At trial, the prosecutor informed the court that Perez intended to stipulate to admission of forensic laboratory reports confirming that the substance seized from the truck was cocaine. The following exchange occurred:

THE COURT: Is there a written stipulation to that effect?

[DEFENSE COUNSEL]: There is, Your Honor.

THE COURT: Okay.

[PROSECUTOR]: In retrospect, I should have included the signature line for the defendant.

THE COURT: Go ahead and just write that in.

[PROSECUTOR]: Alright.

Brief pause

[PROSECUTOR]: May I approach, Your Honor?

THE COURT: Yes. Just a minute. So I have three exhibits . . . . They’re not exhibits yet. They’re unmarked stipulations, attached to each stipulation; there are a total of three. These are unmarked exhibits that indicates whatever the State is going to identify, whatever the potential exhibit will be admitted, is going to be admitted without requiring further authentication, if otherwise deemed admissible by the Court. So is there going to be an objection to any of this evidence?

[DEFENSE COUNSEL]: No, sir.

THE COURT: Okay.

[DEFENSE COUNSEL]: My understanding is that we’re talking about the drugs themselves and the absence of any latent fingerprint evidence on the packaging.

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THE COURT: One of them there is a U.S. Department of Justice Drug Enforcement Administration, DEA, dated March 10th, 2016, regarding the fact that there were no latent prints developed; another one is from the same agency, dated January 28, 2016, indicating 2,994 grams of cocaine were identified, whatever was analyzed, that's what was identified, and the weight. So it identified the substance being cocaine, and weight being what I just said it was. And finally, the last one is dated January 28, 2016, the same date as the last one. Again, it is the substance that was analyzed was identified as being cocaine, and then the weight of this is stated to be 5,995 grams.

[DEFENSE COUNSEL]: That is correct.

THE COURT: Then the State is going to then -- how do you intend to offer these into evidence, just so there is no confusion?

[PROSECUTOR]: At the appropriate time, Your Honor, with the Case Agent responsible ultimately for collecting the substances, I would move to introduce the stipulations at the same time as the physical evidence, and then move to publish the documents themselves.

THE COURT: Mr. Baucino?

[DEFENSE COUNSEL]: No objection.

THE COURT: If you'll approach, at the appropriate time, please do so. I note that all the parties, both attorneys and the defendant have all signed each stipulation; again, there being a total of three stipulations, with the exhibits identified in cursory fashion attached to each stipulation.

The trial court admitted the stipulated evidence later in the trial. The jury found Perez guilty on all charges. The court sentenced him to three consecutive sentences of 175 to 222 months in prison. Perez timely appealed.

**Analysis**

On appeal, Perez argues that the trial court erred by permitting him to stipulate to the admission of the forensic laboratory reports without engaging in a colloquy to ensure he understood the consequences of that decision. He contends that "a trial judge is required to personally address a defendant whose attorney seeks to waive any of his constitutional

## STATE v. PEREZ

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rights via stipulation with the State.” As explained below, we reject this argument.

We begin by acknowledging that Perez’s stipulation acted as a waiver of his Confrontation Clause rights and other corresponding constitutional rights. Without the stipulation, the State would have been required to call a witness to discuss the lab reports. That witness could be cross-examined by Perez. Thus, by stipulating to the admission of the lab reports, Perez waived his right to cross-examine the State’s witness. *See State v. Moore*, 275 N.C. 198, 210, 166 S.E.2d 652, 660 (1969).

But the waiver of Confrontation Clause rights does not require the sort of extensive colloquy needed to waive the right to counsel or enter a guilty plea. *Cf. Boykin v. Alabama*, 395 U.S. 238 (1969). Perez argues that our decision in *State v. English*, 171 N.C. App. 277, 283–84, 614 S.E.2d 405, 409–10 (2005), imposed a requirement for trial courts to engage in a personal colloquy directly with the defendant before stipulating to the admission of evidence, but that is not what *English* holds. Instead, *English* simply reaffirmed that defendants can waive their Confrontation Clause rights by stipulating to the admission of evidence that otherwise would be admissible only when accompanied by live testimony. *Id.*

To be sure, the trial court in *English* engaged in the sort of colloquy that Perez believes should be a constitutional requirement in every case. But *English* did not hold that this colloquy was necessary. *Id.* Indeed, in his concurrence in *English*, Judge Steelman suggested that the Court should have sanctioned the defendant’s appellate counsel for asserting the Confrontation Clause argument because the trial court’s colloquy “went above and beyond” what is required and rendered defendant’s argument frivolous. *Id.* at 286, 614 S.E.2d at 411.

Here, both Perez and his counsel signed written stipulations to admit the lab reports without the requirement that they be accompanied by witness testimony. On appeal, this Court is not permitted to determine whether there were strategic reasons for Perez and his counsel to stipulate to the admission of this evidence, but there certainly are conceivable strategic reasons for doing so. *See State v. Todd*, 369 N.C. 707, 711–12, 799 S.E.2d 834, 838 (2017). For example, the stipulation also ensured that the portion of the lab report showing there were no fingerprints on the bricks of cocaine was admissible. Likewise, Perez and his counsel may have been concerned that detailed testimony about the testing of this large amount of seized cocaine may have simply reinforced for the jury that this was a serious drug trafficking case.

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Notably, Perez does not argue that his counsel failed to discuss these strategic issues with him, or that his counsel failed to explain that stipulating to admission of the lab reports would waive his Confrontation Clause rights. Instead, he argues that the trial court should have discussed these issues with him in open court.

We decline Perez's request to impose on the trial courts an obligation "to personally address a defendant whose attorney seeks to waive any of his constitutional rights via stipulation with the State." If Perez did not understand the implications of stipulating to the admission of the lab reports at trial, his recourse is to pursue a motion for appropriate relief asserting ineffective assistance of counsel. Accordingly, we reject Perez's argument and find no error in the trial court's judgments.

NO ERROR.

Judges DILLON and ARROWOOD concur.

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STATE OF NORTH CAROLINA

v.

DENNIS RAYNARD STEELE, DEFENDANT

No. COA17-868

Filed 3 July 2018

**1. Constitutional Law—Confrontation Clause—statements by confidential informant—nonhearsay**

The admission of statements made by a confidential informant to law enforcement at defendant's trial for trafficking cocaine did not violate defendant's Sixth Amendment right to confront witnesses against him where the statements were nonhearsay evidence offered not to prove the truth of the matter asserted but to explain how and why the investigation against defendant began. Further, the trial court gave a limiting instruction to the jury before accepting the testimony to ensure the statements would be properly considered for the purpose for which they were admitted.

**2. Evidence—admissibility—statements by confidential informant**

The admission of statements made by a confidential informant to law enforcement at defendant's trial for trafficking cocaine was not unfairly prejudicial where the statements were relevant and

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explained the steps law enforcement took during its investigation, and the trial court gave the jury a limiting instruction on how the statements could be considered.

**3. Drugs—trafficking cocaine by possession—constructive possession—sufficiency of evidence**

In a trial for trafficking cocaine by possession, sufficient evidence was presented from which the jury could infer that defendant had constructive possession of cocaine found at a residence. Among other things, defendant shared a bedroom in which drug paraphernalia and illegal contraband were found, and defendant made a statement to another arrestee showing his knowledge about the weight of cocaine found in the bedroom.

Appeal by defendant from judgment entered 2 March 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 30 January 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.*

*Nils E. Gerber for defendant-appellant.*

BERGER, Judge.

On March 2, 2017, a Forsyth County jury convicted Dennis Raynard Steele (“Defendant”) of trafficking cocaine. Defendant asserts on appeal that (1) his Sixth Amendment right to confront witnesses testifying against him was violated, (2) the trial court abused its discretion by admitting out-of-court statements of a confidential informant, and (3) the trial court erred in denying his motion to dismiss for insufficiency of the evidence. We disagree.

**Factual and Procedural Background**

On September 16, 2014, Investigator Jeremy Webster with the Forsyth County Sheriff’s Department’s vice and narcotics unit met with a confidential informant who had previously provided reliable information to the department several times. The informant told Investigator Webster that a black male named “Dennis” was manufacturing and selling cocaine, described Dennis as a stocky, dark-skinned black male in his mid-thirties who was known on the streets as “Black,” and provided a phone number at which Dennis could be contacted. According to the informant, Dennis would sell crack cocaine packaged in plastic baggies

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for twenty dollars. Typically, Dennis would sell one-tenth of a gram of crack cocaine, but had sold as much as one-quarter ounce.

Investigator Webster set up a controlled purchase of crack cocaine from Dennis. He had the informant call the phone number for Dennis. The call was answered by a male subject, and the informant arranged a meeting on September 17, 2014 to purchase an eight-ball (one-eighth of an ounce or three and one-half grams) of cocaine. Defendant drove a black Hyundai registered to Tyrice Lenard Hauser to conduct the drug transaction with the informant. Following the controlled purchase, the informant provided Investigator Webster with a plastic bag containing three and one-half grams of crack cocaine.

Members of the narcotics unit subsequently became involved in a multi-agency investigation in a neighboring jurisdiction, and, therefore, made no significant progress in this case until December of 2014 when Investigator Webster observed the black Hyundai from the controlled purchase parked at a home on Hanes Avenue in Winston-Salem. By this time, according to the informant, Dennis continued to sell crack cocaine. However, because Dennis was not accepting new customers, investigators were unable to proceed further with an undercover investigation.

In January and February 2015, investigators conducted five trash-pulls at 631 Hanes Avenue to gather additional information, and found evidence of drug use and distribution. The trash also contained dry cleaning tags with the name “Dennis Still” and mail addressed to “Dennis Steele.”

Investigators executed a search warrant at the Hanes Avenue location on March 4, 2015. Defendant and Monchea Cunningham were exiting one of the bed-rooms when officers first entered the house. Tyjuan Hauser was also found in the residence, along with a two-year-old child. Investigators located digital scales and a razor blade with white residue in the kitchen. Marijuana and a plastic bag containing a capsule with white powder on it were found in a bedroom which also contained mail addressed to Tyrice Hauser.<sup>1</sup> A receipt with Defendant’s name on it to a local pawn shop was found in the dining room.

When investigators searched the bedroom of Defendant and Cunningham, they observed an unlatched padlock on the door. Defendant and Cunningham had the only keys to the padlock, and used it to prevent others from accessing the bedroom. A search of the room uncovered marijuana, mail addressed to Defendant, two cell phones, a

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1. Tyrice and Tyjuan Hauser are adult children of Monchea Cunningham.

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wallet containing Defendant's driver's license, and more than \$400.00 in cash. A box located near the nightstand contained latex gloves, a pair of goggles, and two boxes of plastic baggies.

Three plastic bags containing cocaine and crack cocaine were found in a dresser drawer, along with oxymorphone tablets. One bag contained eighteen individual baggies of crack cocaine packaged for sale. The total weight of the drugs and packaging was 65.8 grams. Chemical analysis of the materials showed 53.78 grams of cocaine were recovered from the residence.

A Ford Crown Victoria registered to Defendant and the black Hyundai registered to Tyrice Hauser that had been observed by officers at the controlled buy were parked at the residence. A medical invoice was found in the Crown Victoria addressed to Defendant at 631 Hanes Avenue, Winston-Salem, North Carolina.

Following the search of the premises, Defendant and Cunningham were arrested. Defendant declined to speak with investigators. However, while being processed at the jail, Defendant was asked for his address. Defendant was unable to provide an address, stating, "The one on my license. 5919 or 5919 – 5939 Clemmons – 5909 – whatever is on my license." Defendant also told Corporal Michael Hudak that he wanted to send a letter from the jail to his home, and asked Corporal Hudak if he could write down the address listed on his license because he was unable to remember the address.

While waiting in the magistrate's office, officers overheard Defendant speaking with another arrestee. The two discussed a heroin dealer in Mocksville, and Defendant told the other individual he had been arrested for a little crack, but "he wasn't concerned because it was just a little over two ounces." At the time, officers had not weighed the cocaine, and could not have communicated to Defendant that 53.78 grams, or 1.9 ounces, had been recovered from the residence.

Cunningham waived her *Miranda* rights and told officers she had known Defendant for more than ten years. She admitted that Defendant had keys to the residence at 631 Hanes Avenue, and testified at trial that Defendant lived at the residence. She also stated that she and Defendant had the only keys to the padlock on the bedroom door, but denied knowledge of any controlled substances in the residence, except marijuana. Regarding the cocaine found in the bedroom, Cunningham told investigators, "I didn't put it there."

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On August 17, 2015, the Forsyth County Grand Jury indicted Defendant for trafficking in cocaine and possession of a Schedule II controlled substance. Defendant was tried in Forsyth County Superior Court, and the jury convicted Defendant of trafficking cocaine. Defendant was sentenced to thirty-five to fifty-one months in prison and assessed a fine of \$50,000.00. Defendant gave oral notice of appeal.

AnalysisI. Sixth Amendment

[1] Defendant contends the trial court erred by admitting statements made by the confidential informant through the testimony of Investigator Webster. He specifically argues that the informant's hearsay statements about Defendant's prior sale and manufacture of cocaine should not have been admitted because Defendant was given no opportunity to confront and cross-examine the informant in violation of his constitutional rights as protected by the Sixth Amendment. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted), *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010).

The Sixth Amendment guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The United States Supreme Court has held the Confrontation Clause applies only to testimonial evidence. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). Testimonial evidence includes

material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, and statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]

*Id.* at 51-52, 158 L. Ed. 2d 177 (cleaned up). However, "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9, 158 L. Ed. 2d at 198 n.9.

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“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-801(c) (2017). The Rules of Evidence generally exclude the use of hearsay statements. N.C. Gen. Stat. § 8C-802 (2017).

However, “[o]ut of court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay.” *State v. Anthony*, 354 N.C. 372, 403-04, 555 S.E.2d 557, 579 (2001) (citation and quotation marks omitted), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). Moreover, “statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence.” *Id.* at 404, 555 S.E.2d at 579 (citation omitted). “[A]dmission of nonhearsay raises no Confrontation Clause concerns.” *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (citation and quotation marks omitted), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002).

This Court has consistently held that statements by a confidential informant to law enforcement officers which explain subsequent steps taken by officers in the investigative process are admissible as nonhearsay and “not barred by the Confrontation Clause.” *State v. Wiggins*, 185 N.C. App. 376, 384, 648 S.E.2d 865, 871 (citing *Crawford*, 541 U.S. at 59 n.9, 158 L. Ed. 2d at 198 n.9), *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007); *see also State v. Batchelor*, 202 N.C. App. 733, 690 S.E.2d 53 (2010); *State v. Leyva*, 181 N.C. App. 491, 640 S.E.2d 394 (2007); *State v. Rogers*, \_\_\_ N.C. App. \_\_\_, 796 S.E.2d 91, *writ allowed*, 369 N.C. 526, 797 S.E.2d 2 (2017).

Here, Investigator Webster testified about the information provided by the confidential informant and the subsequent steps he took to investigate Defendant.

[The State:] What did the confidential informant tell you at that time?

[Webster:] On that date, the confidential informed us – informant – excuse me – advised us that they had knowledge of a black male who was using the name “Dennis” and occasionally using the street name of “Black,” who was selling and manufacturing crack cocaine. The C.I. described Dennis as being a 34-year-old, dark-skinned, black male, average height, stocky build, who kept a short haircut. C.I. stated that Dennis was selling crack cocaine in \$20 bags, with a \$20 bag typically being around a tenth

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of a gram in their estimation. They said that Dennis had sold up to a quarter ounce of crack cocaine in the past, that the crack cocaine was typically packaged in plastic bags. The C.I. also provided the phone number . . . as a phone number to reach Dennis.

[The State:] Investigator Webster, based on that information you received, were you able to set up what's known as a controlled purchase?

[Webster:] We did. On that particular date, September 16th, the C.I. placed a phone call in my presence to the [phone] number and spoke to a male subject. They priced the -- inquired as to the price of 3 1/2 grams of cocaine, or what's commonly referred to as an eight ball of cocaine.

Investigator Webster then described the controlled purchase and law enforcement's subsequent actions to investigate Defendant.

The trial court gave a limiting instruction to the jury before accepting this testimony to ensure the statements would be properly considered by the jury.

[THE COURT:] Members of the jury, I anticipate you're going to hear some testimony about a confidential informant and what this investigator and other officers may have done as a result of their contact with that confidential informant.

Now, ordinarily any statements that that informant may have made would be hearsay because that informant is not here testifying in front of you under oath, but the State is not offering that evidence for the truth of it, and you're not to consider any evidence of what the statement the confidential informant made for its truth. You may consider it for what this officer and other officers may have done as a result of that confidential informant's information.

The defendant in this case, Mr. Steele, is not charged with anything relating to any alleged contact he had with the confidential informant. He is not charged with anything related to that. But you can consider this testimony for what these officers did subsequently in their investigation for the charges that he is on trial for.

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Does everybody understand that?

ALL JURORS: (Indicating in the affirmative.)

THE COURT: And can you follow that instruction?

ALL JURORS: (Indicating in the affirmative.)

THE COURT: All right. We'll let the record reflect that all jurors have indicated they do understand that.

The nonhearsay statements were not offered to prove the truth of the matter asserted, but rather to explain how and why the investigation of Defendant began. Such statements are not precluded by *Crawford v. Washington*, and admission of the same does not violate Defendant's Sixth Amendment rights under the Confrontation Clause. Therefore, the trial court did not err in admitting the confidential informant's statements.

## II. Rule 403

**[2]** Defendant contends the admission of the confidential informant's statements was unfairly prejudicial. We disagree.

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." N.C. Gen. Stat. § 8C-403 (2017). Probative evidence in criminal cases tends to have a prejudicial effect on defendants; however, "the question . . . is one of degree." *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986).

Here, Defendant asserts he was prejudiced by admission of the confidential informant's statements. Specifically, Defendant contends the statements concerning his distribution of illegal drugs were used to show he acted in conformity with the charge of trafficking in cocaine. However, the confidential informant's statements were relevant, and explained the steps taken by officers during the investigation. Further, the trial court's limiting instruction demonstrated that the trial court thoughtfully considered the nature of the testimony and how it could potentially be used by the jury. Defendant has failed to demonstrate that the trial court abused its discretion.

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III. Motion to Dismiss

**[3]** Defendant argues the trial court erred in denying his motion to dismiss for insufficiency of the evidence. We disagree.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). “Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State’s favor.” *State v. Coley*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 810 S.E.2d 359, 363 (2018) (citation omitted). “[S]o long as the evidence supports a reasonable inference of the defendant’s guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant’s innocence.” *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation and quotation marks omitted).

To be convicted of trafficking in cocaine by possession, the State must prove, (1) the defendant knowingly possessed cocaine, and (2) the amount was at least twenty-eight grams. N.C. Gen. Stat. § 90-95(h)(3) (2017). Defendant contests the first element, and argues there was no evidence presented by the State that he possessed the cocaine.

“[P]ossession of contraband can be either actual or constructive[.]” *State v. McNeil*, 359 N.C. 800, 806, 617 S.E.2d 271, 275 (2005) (citation omitted). “Constructive possession exists when a person, while not having actual possession, has the intent and capability to maintain control and dominion over a controlled substance.” *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983) (citation omitted). “Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession.” *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citation omitted). This Court has held that constructive possession “depends on the totality of the circumstances in each case. No single factor controls, but ordinarily *the questions will be for the jury*.” *State v. McBride*, 173 N.C. App. 101, 106, 618 S.E.2d 754,

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758, *disc. review denied*, 360 N.C. 179, 626 S.E.2d 835 (2005) (citation and quotation marks omitted).

Here, the totality of the evidence tended to show, and the jury could reasonably infer, that Defendant lived with Cunningham in the home at 631 Hanes Avenue. Defendant was unable to provide officers with the address on his driver's license, or any other information regarding his living arrangements. Defendant and Cunningham shared a bedroom which also contained drug paraphernalia and illegal contraband, and was padlocked from the outside to prevent entry. Defendant and Cunningham had the only keys to the padlock barring access to the bedroom.

The jury could infer that the items on the nightstand, where Defendant's wallet and mail were located, also belonged to Defendant. Officers found more than four hundred dollars in cash on this nightstand. A box located near the nightstand contained latex gloves, a pair of goggles, and two boxes of plastic baggies, which the jury could infer were used to manufacture, package, or otherwise distribute crack cocaine. A reasonable juror could infer from Cunningham's statement to officers that she did not put the cocaine in the dresser. Moreover, Cunningham stated that she only knew about the marijuana in the home, and that the cocaine did not belong to her. The jury could reasonably infer that Defendant, the only other individual with access to the bedroom, was the individual who had control and dominion over the cocaine found by officers. In addition, Defendant's knowledge of the weight of cocaine found in the bedroom, as demonstrated by his conversation with the other arrestee in the magistrate's office, is yet another incriminating circumstance from which the jury could find Defendant's constructive possession of cocaine.

When viewed in the light most favorable to the State, there was substantial evidence that Defendant was in constructive possession of more than twenty-eight grams of cocaine. Defendant's motion to dismiss for insufficiency of the evidence was properly denied.

### Conclusion

The trial court properly admitted statements by the confidential informant which were used to explain the steps officers took in their investigation, and admission of these statements did not violate Defendant's Sixth Amendment rights under the Confrontation Clause. The trial court did not abuse its discretion by admitting the confidential informant's statements. Finally, the trial court did not err in denying Defendant's motion to dismiss for insufficiency of the evidence because

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the State introduced substantial evidence of constructive possession. Therefore, Defendant received a fair trial free from error.

NO ERROR.

Judges BRYANT and DIETZ concur.

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TOWN OF NAGS HEAD, PLAINTIFF  
v.  
RICHARDSON, ET AL., DEFENDANTS

No. COA17-498

Filed 3 July 2018

**1. Eminent Domain—temporary easement—beach restoration—applicability of public trust rights**

In a condemnation action by a coastal town seeking a ten-year easement to private property in order to carry out a beach restoration project, the trial court erred in entering judgment notwithstanding the verdict (JNOV) in favor of the town eight months after final judgment, since it based its decision on grounds that were not raised at directed verdict or JNOV. The trial court's determination that the town already possessed easement rights through the public trust doctrine and that the taking was therefore non-compensable was improper where the issue was not previously raised by the town in accordance with the Rules of Civil Procedure or the condemnation statutes.

**2. Eminent Domain—temporary easement—beach restoration—compensation—sufficiency of evidence**

Landowners presented sufficient evidence through the expert opinion of an appraiser to support the jury's conclusion that the temporary easement taken by a town for a beach restoration project was compensable in the amount of \$60,000.00, representing the fair market value of the easement.

**3. Eminent Domain—temporary easement—beach restoration—expert testimony—compensable value**

The trial court abused its discretion in admitting the expert testimony of an appraiser in an action by a town taking a ten-year easement to private property to carry out a beach restoration project

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where the appraiser did not provide the method used to derive the value of the easement.

Judge DILLON concurring in part and dissenting in part.

Appeal by Defendants from Judgment Notwithstanding the Verdict entered 17 October 2016 by Judge Gary E. Trawick in Dare County Superior Court. Cross-appeal by Plaintiff from orders entered 17 December 2014 and 25 August 2015 by Judge Gary E. Trawick in Dare County Superior Court. Heard in the Court of Appeals 16 November 2017.

*Hornthal, Riley, Ellis & Maland, LLP, by Benjamin M. Gallop and M. H. Hood Ellis, for Plaintiff.*

*Nexsen Pruet, by Norman W. Shearin, for Defendants.*

INMAN, Judge.

This appeal, following a jury verdict for property owners and entry of judgment notwithstanding the verdict (“JNOV”), presents an issue of first impression: whether a municipality that takes an easement in privately owned oceanfront property to replenish the beach can avoid compensating the private property owner by asserting public trust rights vested in the State. On the record before us, we hold that the property owner is entitled to compensation as provided by the eminent domain statute.

We also hold that the jury’s verdict was supported by a scintilla of evidence and reverse the trial court’s entry of JNOV. But because expert testimony supporting the verdict was admitted in error, we remand for a new trial.

Defendants William W. Richardson and Martha W. Richardson (the “Richardsons”) appeal the entry of JNOV that set aside a jury verdict of \$60,000.00 compensating them for an easement taken by the Town of Nags Head (the “Town”) through eminent domain. The Town took the easement across a portion of the Richardsons’ property to complete a beach nourishment project. In entering the JNOV, the trial court concluded that the Richardsons were entitled to no compensation, reasoning that: (1) the land subject to the easement was encumbered by public trust rights, so the easement was already implied in favor of the Town to protect and preserve those public trust rights; and (2) in the event the easement was not already implied and thus constituted a compensable taking, the Richardsons failed to introduce evidence supporting the

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jury's verdict based on the fair market value of the temporary easement. The Town cross-appeals the denial of its motions *in limine* seeking to exclude testimony by the Richardsons' expert witnesses. We reverse both entry of JNOV and denial of the motions *in limine* and remand for new trial.

**I. FACTUAL AND PROCEDURAL HISTORY**

In early 2011, the Town undertook a beach nourishment project along ten miles of its coastline to combat erosion and improve flood and hurricane protections. The Town mailed a notice of condemnation to owners of oceanfront property along the affected coastline, including the Richardsons. In the notice, the Town informed private property owners of the purposes of the project and asked them to grant the Town an easement across the sand beach portion of their properties. Specifically, the Town requested the following:

The property on which the Town will need to work lies waterward of the following locations, whichever is most waterward: the Vegetation Line; the toe of the Frontal Dune or Primary Dune; or the Erosion Escarpment of the Frontal Dune or Primary Dune.

...

Please be aware that this is not a perpetual easement; the Town only requests that it have the easement rights through April 1, 2021.

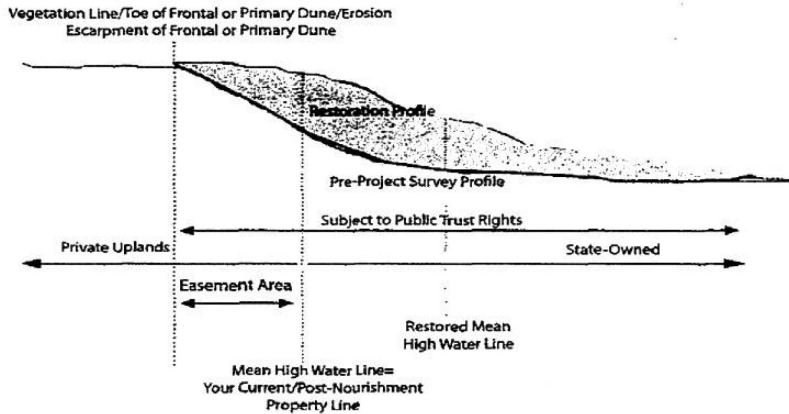
You will not lose land or access rights if you sign the easement. We are simply asking for your approval to deposit sand and work on a specific section of your property on one or perhaps more occasions, during a ten year period. Except for the brief periods when construction or repairs are ongoing, you will still be able to access the beach from your property and construct a dune walkover . . . .

At the outset of the nourishment project, a survey will be conducted to establish the existing mean high water line, which is currently your littoral property line and will remain your property line after the project. . . . As set forth on the enclosed Notice, the Town may need to enter the beach in front of your property.

The notice also included this rendering, which identifies the portion of beach subject to the requested easement and the Town's understanding of related rights and interests:

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Finally, the notice stated that the Town would bring a condemnation action to take, by eminent domain, the easement rights requested in the notice if no voluntary grant of the easement was executed.

The Richardsons did not grant the Town the easement rights requested in the notice and, on 28 March 2011, the Town filed a condemnation action. The Town sought the following easement rights (the “Easement Rights”) in the Richardsons’ dry-sand beach property lying between the toe of the dune and the mean high water mark (the “Easement Area;” together with the Easement Rights as the “Easement”):

The Town, its agents, successors and assigns may use the Easement Area to evaluate, survey, inspect, construct, preserve, patrol, protect, operate, maintain, repair, rehabilitate, and replace a public beach, a dune system, and other erosion control and storm damage reduction measures together with appurtenances thereof, including the right to perform the following on the property taken:

- deposit sand together with the right of public use and access over such deposited sand;
- accomplish any alterations of contours on said land;
- construct berms and dunes;
- nourish and renourish periodically;
- perform any other work necessary and incident to the construction, periodic Renourishment and maintenance of the Town’s Beach Nourishment Project . . . .

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Consistent with the Town's earlier notice, the Easement terminates on 1 April 2021.

The Richardsons filed an answer and motion to dismiss in response to the complaint. On 20 July 2011, the trial court entered a consent order denying the Richardsons' motion to dismiss, vesting title to the Easement in the Town as of the date the complaint was filed pursuant to Section 40A-42 of our General Statutes, and continuing all other hearings authorized by statute until after the Town deposited sand on the beach and Easement Area as part of the nourishment project. The action was then designated an exceptional case and assigned for all purposes to a single superior court judge.

In 2014, after the nourishment project was completed, Judge Gary Trawick presided over a hearing pursuant to Section 40A-47 on all issues other than damages. By order entered 17 December 2014 (the "40A-47 Order"), Judge Trawick decreed that: (1) the area affected by the taking of the Easement was the Richardsons' entire lot consisting of 30,395.2 square feet; (2) the property taken, *i.e.*, the Easement Area, was approximately 7,280.54 square feet of beach lying between the toe of the dune and the mean high water mark at the time of condemnation; and (3) the rights taken were those described in the Town's complaint.<sup>1</sup> Judge Trawick denied a motion by the Town requesting a ruling that the Easement Area, or any portion of it, was subject to public trust rights.

The damages issue was scheduled for trial before a jury in August 2015. In pre-trial motions, both parties raised the issue of the public trust doctrine. After reviewing the issue further, Judge Trawick continued the trial and entered an order revising the 40A-47 Order (the "Revised 40A-47 Order").

The Revised 40A-47 Order concluded that the entire Easement Area was located within the State's "ocean beaches" as defined in N.C. Gen. Stat. § 77-20(e) (2015), and therefore was subject to public trust rights as described in N.C. Gen. Stat. § 1-45.1.<sup>2</sup> The Revised 40A-47 Order provided

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1. The Richardsons present several arguments concerning various other rights that they contend were taken by the Town, including littoral rights, secondary easement access rights vesting in the Town, and a complete loss of title to the Easement Area. None of these rights falls within the ambit of the taking declared in the 40A-47 Order, nor do we need to address their compensability. Resolution of the Richardsons' appeal concerns only whether: (1) public trust rights preclude recovery of damages; and (2) the Richardsons presented evidence sufficient to support the jury's verdict.

2. This Court would later reach the same holding as that decreed by Judge Trawick in his Revised 40A-47 Order. *See Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 92–93, 780

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both parties with the opportunity to seek new appraisals in light of Judge Trawick's ruling. Judge Trawick certified the Revised 40A-47 Order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, but neither party noticed an appeal.

In advance of the trial on damages, the Town filed motions *in limine* seeking to exclude testimony by two appraisers hired by the Richardsons, Gregory Bourne ("Mr. Bourne") and Dennis Gruelle ("Mr. Gruelle"). The trial court prohibited all expert witnesses from testifying to opinions not disclosed prior to or at the time of their respective depositions. The trial court otherwise denied the motions.

At trial, Messrs. Bourne and Gruelle provided testimony and portions of their written appraisal reports were published to the jury. Mr. Bourne's report and testimony asserted that the taking had diminished the fair market value of the remainder of the Richardsons' property by \$160,000. Mr. Gruelle's report and testimony asserted that the taking had diminished the value of the remainder of the Richardsons' property by \$233,000.00.

Mr. Bourne testified that, in valuing only the land constituting the Richardsons' entire lot, he first determined the "[h]ighest and best use[, which] is that use which you can physically and possibly build that is legally permissible, that is financially feasible, and that reflects the maximum value, that will generate the maximum value of the property." After determining the best and highest use of the Richardsons' entire lot to be residential, he employed sales comparison and cost approaches to reach a "before [taking] land value [of] \$855,000." After including the improvements to the property and other adjustments, Mr. Bourne arrived at a pre-taking value of the improved lot of \$1,040,000.

To determine the impact of the Easement taking on the fair market value of the Richardsons' lot, Mr. Bourne reviewed comparable sales and found an eight percent difference in the value of oceanfront lots that extended all the way to the mean high water mark and beachfront lots that stopped short of the ocean. He made this comparison because, per Section 146-6(f), title to new land seaward of the former mean high water mark created by the nourishment project would vest

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S.E.2d 187, 196–97 (2015) (holding that N.C. Gen. Stat. § 77-20 and the common law vest in the State public trust rights in "ocean beaches" as measured on the landward side by the more seaward of the toe of the frontal dune or the first vegetation line; where neither exists, it is measured by the storm trash line "or any other reliable indicator of the mean regular extent of the storm tide").

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in the State.<sup>3</sup> The Town's use of the Easement, therefore, affixed the Richardsons' property line at the former mean high water mark and created a strip of State-owned land between the Richardsons' property line and the ocean. After considering damage to the unencumbered portion of the lot, Mr. Bourne testified that the proper measure of damages was "[t]he difference between the before and the after [fair market values of the Richardsons' property] and I came up with \$160,000." Applying his calculation to the entire lot's unimproved value of \$855,000, Mr. Bourne "came up with an after the taking land value, that is the value of the land now encumbered by this easement for 10 years, of \$70,000."

The Richardsons' other appraiser, Mr. Gruelle, testified that the highest and best use of the Richardsons' lot was residential and, after comparing sales of similar properties, concluded that "the value of the site was [\$]880,000. . . . [\$]880,000 is attributable to the value of the land."

Taking the \$880,000 value of the entire lot with its highest and best use as residential property, Mr. Gruelle calculated a value of \$28.95 per square foot. He then multiplied that number by the total square footage of the Easement Area, 7,280, and arrived at a total value of \$210,756 for the Easement Area. Mr. Gruelle estimated that, based on the Easement Rights taken, the Town's use of the Easement Area for ten years exploited 90 percent of its land value; as a result, Mr. Gruelle testified that the value of the Easement taken was approximately \$190,000.<sup>4</sup> Mr. Gruelle combined the Easement value with other negative impacts on the unencumbered property—including the effect on the view and ease of beach access resulting from the increased height of the dunes—to which he assigned a value of \$43,000, and opined that "the total impact of the property is \$233,000. . . . That is the just compensation to leave the property owner whole."

At the close of the Richardsons' evidence, the Town moved for directed verdict. Reasserting the grounds raised in its motions *in limine*, the Town argued that Messrs. Bourne's and Gruelle's valuations were unreliable and should be stricken; if that evidence were stricken, the Richardsons would have failed to prove damages, and the Town would be entitled to a directed verdict. The trial court denied the motion.

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3. Section 146-6(f) provides, in relevant part: "title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in the State." N.C. Gen. Stat. § 146-6(f) (2017).

4. By mathematical formula, Mr. Gruelle calculated the value of the Easement as follows:  $((\$28.95/\text{ft}^2) * 7,280\text{ft}^2) * 0.9 = \$189,680.4$ .

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Michael Moody, an expert witness for the Town, provided an opinion on two distinct fair market values: (1) the difference in fair market value of the Richardsons' entire lot before the taking and the remainder after the taking under the "before and after method;" and (2) the fair market value of the Easement. Mr. Moody determined the difference in total market value to be zero and determined the fair market value of the Easement to be \$330. He arrived at the second number through the "market extraction" method, whereby he found two comparable vacant ocean-front lot sales, one encumbered by a permanent easement for beach nourishment and one unencumbered. Mr. Moody then calculated the difference in those sale prices, which came out to \$1,000, and attributed that difference to the presence of the permanent easement. Because the Easement in this case was for a ten-year period rather than perpetual in duration, he reduced the extracted amount by two-thirds and arrived at a fair market value of \$330 for the Town's taking.

The Town renewed its earlier motion for directed verdict at the close of its evidence, and the motion was denied. Following instruction by Judge Trawick and deliberations, the jury returned a verdict finding that the fair market value of the Easement was \$60,000, and the difference in fair market value of the Richardsons' property pre-taking and the remainder post-taking was zero. The jury awarded the Richardsons \$60,000 as the greater value.

The Town timely filed a motion for JNOV, arguing, among other things, that the Richardsons had failed to introduce evidence showing the fair market value of the Easement. Joined in the motion for JNOV was a motion for new trial and a motion for remittitur. Neither motion was ruled on by the trial court.

Eight months later, following a hearing and additional briefing, Judge Trawick entered JNOV in favor of the Town, declaring that the Richardsons should recover nothing. Judge Trawick identified two bases for his ruling: (1) there was no compensable taking, as the Town already possessed an easement by implication to protect and preserve the State's ocean beaches by virtue of the State's public trust rights; and (2) in the event there was a compensable taking, there was no evidence from which the jury could find a fair market value of the Easement,<sup>5</sup> so the only available calculation of damages was the "before and after" value of the

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5. This conclusion contradicts the trial court's earlier conclusion in the same order that "competent expert testimony introduced at trial on the . . . market value of the [Easement shows a] \$330.00 market value . . ."

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unencumbered property. Because the jury found that value to be \$0, that was the proper amount of damages.

The Richardsons appealed the JNOV; the Town cross-appealed the 40A-47 Order and Judge Trawick's denial of its motions *in limine*.

## II. DISCUSSION

The Richardsons contend that the trial court erred in entering JNOV on grounds not asserted in the Town's motions for directed verdict and despite relevant evidence, provided by Mr. Gruelle, to support the jury verdict. We agree and reverse the entry of JNOV. However, we also agree with the Town that the trial court abused its discretion in admitting Mr. Gruelle's expert testimony over the Town's motions *in limine* and objections. As a result, we remand the case for a new trial.

### A. *Standard of Review*

We review the entry of JNOV *de novo*, substituting our judgment for that of the trial court. *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4 (2008). In exercising that judgment, we ask "whether the evidence was sufficient to go to the jury," *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 499, 524 S.E.2d 591, 595 (2000), and "[t]he essential question is whether the [non-movant] met his burden at trial of presenting substantial evidence of his claim when all the evidence is taken in the light most favorable to the [non-movant] and all inconsistencies are resolved in favor of the [non-movant]." *Asfar v. Charlotte Auto Auction, Inc.*, 127 N.C. App. 502, 504, 490 S.E.2d 598, 600 (1997). "The hurdle is high for the moving party [on JNOV] as the motion should be denied if there is more than a scintilla of evidence to support the [non-movant's] *prima facie* case." *Tomkia Invs.*, 136 N.C. App. at 499, 524 S.E.2d at 595 (citations omitted). However, JNOV is proper "when the evidence is insufficient as a matter of law to support the verdict." *Beal v. K. H. Stephenson Supply Co., Inc.*, 36 N.C. App. 505, 507, 244 S.E.2d 463, 465 (1978). Critically, we are concerned only with the evidence's relevancy and probative value, as opposed to its admissibility, on review of JNOV. *See, e.g., Bishop v. Roanoke Chowan Hosp., Inc.*, 31 N.C. App. 383, 385, 229 S.E.2d 313, 314 (1976) ("All *relevant* evidence admitted by the trial court, whether competent or not, must be accorded its full *probative force* in determining the correctness of its ruling upon a motion for [JNOV.]" (citation and quotation marks omitted) (emphasis added)).

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*B. Public Trust Doctrine*

The public trust doctrine, established by the common law of this State, involves two concepts: (1) public trust lands, which are “certain land[s] associated with bodies of water [and] held in trust by the State for the benefit of the public[;]” and (2) public trust rights, which are “those rights held in trust by the State for the use and benefit of the people of the State in common.” *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 41, 621 S.E.2d 19, 27 (citation and internal quotation marks omitted) (2005); *see also Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 88, 780 S.E.2d 187, 194 (2015) (“This Court has recognized both public trust lands and public trust *rights* as codified by our General Assembly[.]” (emphasis added)). Public trust lands include “the watercourses of the State and . . . the State’s ocean and estuarine beaches[.]” *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27 (citation and internal quotation marks omitted), regardless of whether they are publicly or privately owned. *Nies*, 244 N.C. App. at 93, 780 S.E.2d at 196–97. Public trust rights attach to the privately and publicly owned lands between the ocean waters and the most seaward of the following: the first line of stable natural vegetation, the toe of the frontal dune, or “any other reliable indicator of the mean regular extent of the storm tide.” *Id.* at 93, 780 S.E.2d at 197.

Public trust rights “include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities” offered by public trust lands, as well as “the right to freely use and enjoy the State’s ocean and estuarine beaches and public access to the beaches.” N.C. Gen. Stat. § 1-45.1 (2017); *see also Nies*, 244 N.C. App. at 88, 780 S.E.2d at 194. The State is tasked with protecting these rights pursuant to the North Carolina Constitution:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

N.C. Const. art. XIV, § 5.

Towns “may, by ordinance, define, prohibit, regulate, or abate acts, omissions, or conditions upon the State’s ocean beaches and prevent or

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abate any unreasonable restriction of the public's rights to use the State's ocean beaches." N.C. Gen. Stat. § 160A-205(a) (2017).<sup>6</sup> Thus, municipalities may "limit[ ] the public's right to use the public trust dry sand beaches . . . through appropriate use of the State's police power[.]" *Nies*, 244 N.C. App. at 93, 780 S.E.2d at 197, enforce ordinances regulating the public trust through injunction and abatement actions, N.C. Gen. Stat. § 160A-175 (2017), and may assert the public trust doctrine as a defense to suits challenging such non-compensable regulatory exercises as Fifth Amendment takings requiring compensation. *Nies*, 244 N.C. App. at 94, 780 S.E.2d at 197; *cf. Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 136-37, 693 S.E.2d 208, 213 (2010) (allowing a private defendant to assert the public trust doctrine as a defense to an action for trespass).

The legislature also has delegated the State's eminent domain powers to municipalities and counties for the purposes of:

[e]ngaging in or participating with other governmental entities in acquiring, constructing, reconstructing, extending, or otherwise building or improving beach erosion control or flood and hurricane protection works, including, but not limited to, the acquisition of any property that may be required as a source for beach renourishment.

N.C. Gen. Stat. § 40A-3(b1)(10) (2017).

*C. Application to This Case*

**[1]** We now consider whether public trust rights render the taking here non-compensable and hold, on the procedural facts before us, that they do not.

The trial court concluded in the Revised 40A-47 Order that the Easement Area, though the private property of the Richardsons, was public trust land subject to public trust rights.<sup>7</sup> But the Town did not

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6. This same authority has also been delegated to the State's counties. N.C. Gen. Stat. § 153A-145.3 (2017).

7. The Richardsons conceded in their briefs that public trust rights attached to the Easement Area. Despite this concession, the Richardsons argue that the Revised 40A-47 Order was "erroneous[.]" and that the original 40A-47 Order, decreeing the Easement Area free of public trust rights, is the law of the case. Rule 54(b) of the North Carolina Rules of Civil Procedure states that "in the absence of entry of . . . a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2017). Because orders entered under Section 40A-47 are interlocutory rather than final judgments, *City of Winston-Salem v. State*, 185 N.C. App. 33, 37, 647 S.E.2d 643, 646 (2007), Judge Trawick, who entered the earlier 40A-47 Order, was permitted to

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argue at trial that the public trust doctrine rendered the taking non-compensable. The trial court erred in entering JNOV eight months after the verdict on a basis not argued during the trial.

A motion for JNOV may be granted only “in accordance with [the movant’s] motion for a directed verdict.” N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (2017); *see also Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 100, 515 S.E.2d 30, 36 (1999) (“A motion for JNOV is treated as a renewal of the motion for directed verdict. Thus, a movant cannot assert grounds on a motion for JNOV that were not previously raised in the directed verdict motion.” (internal citations omitted)). Because the trial court’s entry of JNOV grants the Town’s motion for JNOV “pursuant to Rule 50(b)[,]” it is proper only if it accords with the Town’s earlier motion for directed verdict.

The Town’s motion for directed verdict and motions *in limine* presented no argument that it already possessed the Easement Rights through the public trust doctrine. Nor did the Town argue that the public trust doctrine rendered the taking non-compensable. The motions sought only to limit expert testimony that would deny the effect of public trust rights on the compensable value of the Richardsons’ property and, specifically, the Easement Area.

During the hearing on the motions *in limine*, when asked by the trial court why the public trust did not eliminate the need for condemnation, the Town expressly argued that the Easement Rights were *not* public trust rights and the condemnation was still necessary:

[THE TOWN]: . . . The public trust rights [are] not about what we took, it’s about the value of what we took.

. . .

THE COURT: Now let me ask you, then why did you have to do a taking?

[THE TOWN]: Because we wanted to put trucks and pipes and wanted to put sand on the property. That is what is in the complaint. . . . Those are the rights we took. *Public*

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enter the Revised 40A-47 Order. The Revised 40A-47 Order was also certified for immediate appeal pursuant to Rule 54(b), and neither party timely noticed an appeal therefrom; as a result, they may not contest its contents months after its entry. *See, e.g., Guthrie v. Conroy*, 152 N.C. App. 15, 19, 567 S.E.2d 403, 407 (2002) (noting that appeal of an order certified pursuant to Rule 54(b) must be immediately appealed within the time proscribed by N.C. R. App. P. 3(c)(1)). We leave the Revised 40A-47 Order undisturbed in resolving this appeal.

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*trust rights doesn't go to the rights we took. It goes to the value of what we took.* It limits the value because some of their rights and their bundle of rights weren't there in the first place. . . . [A]ny time [the Richardsons] say it's got something to do with the rights we took, it has nothing to do with the rights we took. It has to do with the rights that were there to take.

. . .

[W]e don't want a ruling of this Court to preclude people from being able to walk on this beach. And we also don't want their perspective to keep us from showing that the value of this area was reduced by people having the ability to walk on the beach. It may or may not have been reduced by much and that is what we want. We want the ability to be able to say that people can walk on the beach in this easement area.

(emphasis added). The Town's motions for directed verdict at trial were likewise devoid of any argument that the Town already possessed Easement Rights or that the public trust doctrine precluded recovery, as they were simply renewals of the earlier motions *in limine* regarding expert testimony offered by the Richardsons, and the Town's motion for JNOV conceded that the taking was compensable and expressly requested entry of a judgment in the Richardsons' favor in the amount of \$330.

During the JNOV hearing, Judge Trawick, unprompted by either party, advanced the question of whether the Town already possessed the Easement Rights through the public trust and requested additional briefing on the issue at the hearing on the motion for JNOV. Judge Trawick ultimately granted the JNOV motion based on the conclusion that public trust rights precluded an award of compensation to the Richardsons.

But a trial court may only enter a *sua sponte* order on JNOV within ten days of entry of judgment; the JNOV here was entered months after final judgment. N.C. Gen. Stat. § 1A-1, Rule 50(b)(1); *see also Jones v. S. Gen. Ins. Co.*, 222 N.C. App. 435, 436–37, 731 S.E.2d 508, 509 (2012) (reversing a trial judge's *sua sponte* order for new trial entered more than ten days after judgment as “not properly entered” and “not permissible”). Further, such a *sua sponte* order may only “grant, deny, or redeny a motion for directed verdict made at the close of all the evidence . . . .” N.C. Gen. Stat. § 1A-1, Rule 50(b)(1). So, eight months after final judgment, the trial court could only enter JNOV under Rule 50(b)(1)

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consistent with those arguments raised by the Town in its timely filed motions for directed verdict and JNOV. As a result, we hold that the trial court erred in concluding on JNOV that the Town already possessed the Easement Rights and that the public trust doctrine rendered the taking non-compensable because neither argument was raised at directed verdict or JNOV.

Our holding finds further support in precedent interpreting procedural condemnation statutes and related caselaw. Section 40A-47 of our General Statutes provides that the trial court is required to determine “any and all issues *raised by the pleadings* other than the issue of compensation, including . . . title to the land, interest taken, and area taken.” N.C. Gen. Stat. § 40A-47 (2017) (emphasis added). This Court has read virtually identical language in highway condemnation statutes to mean that “at a minimum, a party must argue all issues of which it is aware, or reasonably should be aware, in [such] a hearing.” *City of Wilson v. The Batten Family, L.L.C.*, 226 N.C. App. 434, 439, 740 S.E.2d 487, 491 (2013) (interpreting language almost identical to Section 40A-47 in Section 136-108). Also, in *In re Simmons*, 5 N.C. App. 81, 167 S.E.2d 857 (1969), this Court reviewed a host of treatises and decisions from other jurisdictions concerning the condemnor’s admission of ownership in a condemnation action, and quoted with approval the following:

[T]he petitioner is estopped from showing that title is in the public or in itself, by dedication prescription or otherwise, if it has alleged in its petition that the respondent is the owner. . . . The institution of the [condemnation] proceeding admits the ownership. The condemnor cannot claim the beneficial ownership of the land and at the same time assert that the condemnee claims all or some part of that interest[.] . . . A party cannot proceed to condemn land as the property of another and then in that same proceeding set up a paramount right or title in itself either by prescription, dedication or otherwise.

5 N.C. App. at 86–87, 167 S.E.2d at 861 (internal citations and quotation marks omitted).

Here, the Town alleged in its complaint that the Richardsons, and not the Town, possessed the Easement Rights; the Richardsons’ answer admits such possession. Assuming *arguendo* that the Town could still request a determination of the issue by the trial court when no issue as to the Town’s pre-existing possession of the rights was “raised by the pleadings,” N.C. Gen. Stat. § 40A-47, it was required to assert such an

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argument in the hearing provided by that statute. *City of Wilson*, 226 N.C. App. at 439, 740 S.E.2d at 491.

In the initial hearing to determine all issues other than damages pursuant to Section 40A-47, counsel for the Town stated that “our theory of the taking here, [is] that the Town doesn’t have the right to place the sand and do the work for this project without acquiring the easement rights we have condemned in this case.” The hearing continued:

[THE TOWN]: We’re talking about the rights—*clearly they have the right to exclude the contract which—but for our acquisition of the easement rights.*

...

THE COURT: . . . You can’t file a declaration for taking and then ask me to say that you took less than what the declaration says.

[THE TOWN]: *I completely agree.*

(emphasis added). As recounted *supra*, the Town maintained that position through the hearing on its motions *in limine* even when alerted to the question by the trial court. Indeed, that was the Town’s apparent position through its motions for directed verdict, final judgment, and its motion for JNOV. On appeal from a post-judgment order, the Town’s argument comes too late.

Finally, although orders entered following an “all other issues” hearing are interlocutory, errors pertaining to “vital preliminary issues” determining what land is being condemned and “any question[s] as to its title” must be immediately appealed. *N.C. State Highway Comm’n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967); *see also Dep’t of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999) (limiting the immediate appeal rule in *Nuckles* to those two questions); *but see Town of Apex v. Whitehurst*, 213 N.C. App. 579, 583–85, 712 S.E.2d 898, 901–02 (2011) (holding that whether condemnation was for a public purpose, though not an issue of title or identification of land, was nonetheless a vital issue requiring immediate appeal, as it was necessary to determine whether a lawful taking had occurred at all).

The Town’s argument that it already possessed the Easement Rights under the public trust doctrine raises an issue of vital importance concerning a question of title: whether the Richardsons’ title included the rights the Town sought to take from them through condemnation. Because the Revised 40A-47 Order decreed that the Easement Rights

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were taken by the Town through condemnation, the Town was required to assert any argument to the contrary by appeal within 30 days of the order's entry pursuant to N.C. R. App. P. 3(c)(1). *See Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784; *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709; *City of Wilson*, 226 N.C. App. at 440, 740 S.E.2d at 491; *Whitehurst*, 213 N.C. App. at 585, 712 S.E.2d at 902. This it failed to do, and we dismiss those arguments.<sup>8</sup>

*D. Sufficiency of the Evidence*

**[2]** Having resolved whether the taking in this case was compensable, we consider whether the Richardsons presented evidence sufficient as a matter of law to support a jury verdict of \$60,000 for the fair market value of the Easement. We hold that they did.

Section 40A-64(b) provides:

If there is a taking of less than the entire tract, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

N.C. Gen. Stat. § 40A-64(b) (2017). Valuation under the first subpart, Section 40A-64(b)(i), is commonly referred to as the “before and after method[.]” *Town of Midland v. Wayne*, 368 N.C. 55, 63, 773 S.E.2d 301, 307 n. 6 (2015), while the second method, per the plain language of the statute, is simply a fair market valuation of the discrete portion of property taken. N.C. Gen. Stat. § 40A-64(b)(ii). Thus, to measure the proper award to the Richardsons, the jury was required to: (1) calculate a value employing the “before and after method;” (2) calculate the fair market value of the Easement taken by the Town; and (3) award the Richardsons the greater of those two values.

Because the jury calculated the “before and after” measure of value to be zero and the Richardsons request reinstatement of the final

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8. Though we hold that the Town is estopped from advancing the argument that it already possessed the Easement Rights pursuant to the public trust doctrine in this action, nothing in this opinion should be read to preclude condemnors in other actions from asserting such an argument prior to a 40A-47 hearing, timely and appropriately amending their complaints and pleadings if able, or otherwise raising the issue when proper before the trial court. Nor should this opinion be read to preclude a trial court from amending its 40A-47 order pursuant to Rule 54(b) of our Rules of Civil Procedure prior to final judgment, or under any other available authority, when doing so would not run afoul of the

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judgment on the jury verdict, our review concerns only the jury's calculation of the market value of the Easement itself.

While the statute does not define "fair market value," our Supreme Court has described it as follows:

[T]he well established rule is that in determining fair market value the essential inquiry is "what is the property worth in the market, viewed not merely with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for all valuable uses?"

*State v. Johnson*, 282 N.C. 1, 14, 191 S.E.2d 641, 651 (1972) (quoting *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959) (alteration in original)). Stated in other terms, "the fair market value is 'the highest market price [property] would bring for its most advantageous uses [at the time of taking] and in the foreseeable future.'" *In re Appeal of Parsons*, 123 N.C. App. 32, 41, 472 S.E.2d 182, 188 (1996) (quoting *United States v. Cunningham*, 166 F.Supp. 76, 78 (E.D.N.C. 1958), *rev'd on other grounds*, 270 F.2d 545 (4th Cir. 1959), *cert. denied*, 362 U.S. 989, 4 L. Ed. 2d 1022, (1960)). In calculating that value, "[a]ll factors pertinent to a determination of what a buyer, willing to buy but not under compulsion to do so, would pay and what a seller, willing to sell but not under compulsion to do so, would take for the property must be considered." *City of Charlotte v. Charlotte Park & Recreation Comm'n*, 278 N.C. 26, 34, 178 S.E.2d 601, 606 (1971).

Evidence of fair market value may be introduced through, among other means, the expert opinions of appraisers or the lay testimony of the landowner. *Dep't. of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6, 637 S.E.2d 885, 890 (2006). "Methods of appraisal acceptable in determining fair market value include: (1) comparable sales, (2) capitalization of income, and (3) cost. While the comparable sales method is the preferred approach, the next best method is capitalization of income when no comparable sales data are available." *Id.* at 13, 637 S.E.2d at 894 n. 5 (internal citations omitted). That said, "our courts have recognized that 'expert real estate appraisers should be given latitude in determining the value of property' in eminent domain cases[.]" *City of Charlotte v. Combs*, 216 N.C. App. 258, 263, 719 S.E.2d 59, 63 (2011) (quoting *Duke*

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prohibition against superior court judges modifying, overruling, or changing another superior court judge's ruling. *See, e.g., Bruggeman v. Meditrust Co., LLC*, 165 N.C. App. 790, 795, 600 S.E.2d 507, 510-11 (2004) (detailing the rule prohibiting superior court judges from altering one another's orders and exceptions thereto).

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*Power Co. v. Mom 'n' Pops Ham House, Inc.*, 43 N.C. App. 308, 312, 258 S.E.2d 815, 819 (1979)).

Here, the jury heard evidence concerning the “before and after method” valuation by the Richardsons’ appraisers, who employed the sales comparison and cost approaches. The jury ultimately found this value to be zero. By contrast, it found the fair market value of the Easement taken to be \$60,000 and awarded the Richardsons that amount as the greater of the found values. The Town contends that verdict is unsupported by legally sufficient evidence. We disagree.

Mr. Bourne, an expert witness for the Richardsons, estimated the Easement’s value to be \$70,000 by calculating the difference in value between properties that were oceanfront, in other words, those with property lines extending to the mean high water mark, and those that were merely beachfront, in other words, those with property lines abutting the beach but stopping short of the mean high water mark. This calculation, however, is derived solely from the beach nourishment project’s impacts and is outside the statutory scope of a taking’s compensable fair market value.

“The value of the property taken . . . does not include an increase or decrease in value before the date of valuation that is caused by (i) the proposed improvement or project for which the property is taken[.]” N.C. Gen. Stat. § 40A-65 (2017). The fair market value of the Easement, as a discrete value under Section 40A-64(b)(ii), cannot be derived from factors resulting from the Town’s beach nourishment project under Section 40A-65.<sup>9</sup> Mr. Bourne’s \$70,000 valuation, statutorily excluded from the fair market value of the Easement, is therefore neither relevant to nor probative of the issue, so this evidence does not support the jury’s award on this question. *See, e.g., Asfar*, 127 N.C. App. at 504, 490 S.E.2d at 600 (recognizing that only substantial, *i.e.* relevant, evidence is considered on JNOV).

Our holding in this context accords with statutory and case-law governing condemnations by the North Carolina Department of Transportation. Compensation for a partial taking for highway condemnations is measured through application of the “before and after method.” N.C. Gen. Stat. § 136-112(1) (2017). If an entire tract is condemned, the condemnee is entitled to “the fair market value of the property at the time of taking.” N.C. Gen. Stat. § 136-112(2). Because the damages statute applicable to this case, Section 40A-64(b), requires the calculation

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9. The Town asserted this argument in its directed verdict motion.

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of both measures of damages contained in Section 136-112, *i.e.*, the fair market value of the discrete taking and the “before and after method” value, reference to our caselaw on damages in highway condemnations is instructive. *See Town of Midland*, 368 N.C. at 63, 773 S.E.2d at 307 (construing Section 40A-64(b) through reference to Section 136-112 and related caselaw).

In applying Section 136-112, this Court has held that “[t]he market value of the condemned property is to be determined on the basis of the conditions existing at *the time of the taking*.” *Dep’t of Transp. v. Mahaffey*, 137 N.C. App. 511, 518, 528 S.E.2d 381, 385 (2000) (emphasis added) (citation omitted). And, while it is true that the post-condemnation impacts of a partial taking may be considered in arriving at a fair market value under that statute, this applies only “to the fair market value of the *remainder* immediately after the taking . . . .” *N.C. State Highway Comm’n v. Gasperson*, 268 N.C. 453, 455, 150 S.E.2d 860, 862 (1966) (emphasis added) (citation omitted). Assuming *arguendo* that Mr. Bourne’s \$70,000 valuation, derived from post-taking impacts, was relevant to the issues of damages in this case, it could only be relevant to the difference in fair market value calculation pursuant to Section 40A-64(b)(i) and not the discrete fair market value of the Easement at the time of taking under Section 40A-64(b)(ii).

We next consider Mr. Gruelle’s testimony and hold that, without regard to its admissibility, it is sufficient as a matter of law to support the jury’s verdict.

“[T]he measure of damages for a temporary taking is the ‘rental value of the land actually occupied’ by the condemnor.” *Combs*, 216 N.C. App. at 261, 719 S.E.2d at 62 (quoting *Leigh v. Garysburg Mfg. Co.*, 132 N.C. 167, 170, 43 S.E. 632, 633 (1903)); *see also United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995) (“[W]hen the Government takes property only for a period of years, . . . it essentially takes a leasehold in the property. Thus, the value of the taking is what rental the marketplace would have yielded for the property taken.”). The United States Supreme Court’s discussion concerning the determination of the value of a temporary taking is instructive:

The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent. . . . But when the property is of a kind seldom exchanged, it

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has no ‘market price,’ and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights. These considerations have special relevance where ‘property’ is ‘taken’ not in fee but for an indeterminate period.

...

[D]etermination of the value of temporary occupancy can be approached only on the supposition that free bargaining between petitioner and a hypothetical lessee of that temporary interest would have taken place in the usual framework of such negotiations. . . . [T]he proper measure of compensation is the rental that probably could have been obtained . . . .

*Kimball Laundry Co. v. United States*, 338 U.S. 1, 5–7, 93 L.Ed. 1765, 1772–73 (1949). Because temporary easements are valued as rentals rather than sales under North Carolina law, *Combs*, 216 N.C. App. at 261, 719 S.E.2d at 62, the fair market value of the Easement taken by the Town is the “fair market rental value for the period of time the property is taken[.]” 4 *Nichols on Eminent Domain* § 12E.01[4] (rev.3d ed. 2006) (citing *Leigh*, 132 N.C. at 170, 43 S.E. at 633).

As recounted *supra*, Mr. Gruelle testified that the Easement was valued at \$190,000. He reached this value by determining the best and highest use of the entire lot, calculating a value per square foot based on that use, and applying that value to the square footage of the Easement Area. He then reduced that total value by ten percent, reasoning that the Town’s use of the Easement Area “represented 90 percent of the value of the easement area.” Mr. Gruelle explained that this valuation “look[s] at [the Easement] as the land rental because that’s what it is[,]” and testified that his number was “consistent with the way the market looks at ground lease or renting, use of the land for a period of time.” In seeking to arrive at the fair rental value of the Easement, Mr. Gruelle provided a scintilla of evidence relevant to that issue. “A scintilla of evidence is defined as very slight evidence,” *Everhart v. O’Charley’s Inc.*, 200 N.C. App. 142, 149, 683 S.E.2d 728, 735 (2009) (citation and quotation marks omitted), and Mr. Gruelle’s \$190,000 valuation provided, at a minimum, very slight evidence sufficient to support the jury’s finding that the Easement’s fair market value was \$60,000.

The Town argues in support of its cross-appeal that Mr. Gruelle’s testimony is incompetent. It further contends that such an argument is

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properly asserted under our Rules of Appellate Procedure as “an alternative basis in law for supporting the [JNOV.]” N.C. R. App. P. 28(c). This is not so; in appellate review of JNOV, “[a]ll relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of its ruling . . . .” *Bishop v. Roanoke Chowan Hosp., Inc.*, 31 N.C. App. 383, 385, 229 S.E.2d 313, 314 (1976) (citation and quotation marks omitted); cf. *Huff v. Thornton*, 23 N.C. App. 388, 391, 209 S.E.2d 401, 403 (1974) (“We hold . . . that an assignment of error directed to the trial court’s ruling on a motion for directed verdict . . . does not present for review rulings on the admission or exclusion of evidence.” (emphasis added)). This limitation on our review is designed to avoid unfairness, as “the admission of such evidence may have caused the [Richardsons] to omit competent evidence of the same import.” *Huff*, 23 N.C. App. at 390, 209 S.E.2d at 403. We therefore do not reach the issue as raised in the Town’s appellee brief under Rule 28(c). Mr. Gruelle’s testimony was admitted—albeit in error, as we hold *infra* Part II.E.—and because it provides a scintilla of evidence to support the jury’s verdict, we reverse the trial court’s entry of JNOV.

*E. The Town’s Cross-Appeal*

[3] Beyond its appellee brief, the Town also cross-appeals the denial of its motions *in limine* on the grounds that Mr. Gruelle’s testimony is incompetent. The Richardsons contend that the Town is without standing to appeal, as it is not a “party aggrieved” within the meaning of N.C. Gen. Stat. § 1-271 (2017). Seeing merit in the Town’s cross-appeal and assuming *arguendo* that the Town does not otherwise have the right to appeal the interlocutory orders, we elect to treat the Town’s cross-appeal as a petition for writ of certiorari and grant it in our discretion. N.C. R. App. P. 21(a)(1) (2017) (“The writ of *certiorari* may be issued . . . when no right of appeal from an interlocutory order exists . . .”).<sup>10</sup>

The Town argues that Mr. Gruelle’s testimony was inadmissible because it failed to meet the criteria of Rule 702(a) of the North Carolina

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10. The Richardsons’ brief on cross-appeal contains a purported “motion for sanctions.” However, “[m]otions to an appellate court may not be made in a brief” and must instead be made in accordance with the applicable Rules of Appellate Procedure. *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996); see also *Johnson v. Schultz*, 195 N.C. App. 161, 164, 671 S.E.2d 559, 562 (2009) (declining to address a motion presented in a brief for noncompliance with N.C. R. App. P. 25 and 37). We decline to consider the Richardsons’ “motion,” particularly in light of the Town’s meritorious argument.

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Rules of Evidence.<sup>11</sup> A trial court's ruling on the admissibility of expert opinion is subject to review only for an abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). *McGrady* adopted the standard of admissibility applicable to expert testimony pursuant to Rule 702(a) as set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993), and clarified in *General Elec. v. Joiner*, 522 U.S. 136, 139 L.Ed.2d 508 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L.Ed.2d 238 (1999). The North Carolina Supreme Court in *McGrady* noted that this admissibility standard "is not new to North Carolina law[,] 368 N.C. at 892, 787 S.E.2d at 10, and that it did not overrule existing caselaw "as long as those precedents do not conflict with the rule's . . . text or with *Daubert*, *Joiner*, or *Kumho*." 368 N.C. at 888, 78 S.E.2d at 8. The principal change in the standard post-*McGrady* regarding reliability is a heightened "level of rigor that our courts must use to scrutinize expert testimony before admitting it." *Id.* at 892, 787 S.E.2d at 10 (citations omitted).

The Town directs us to this Court's pre-*McGrady* decision in *City of Charlotte v. Combs*, 216 N.C. App. 258, 719 S.E.2d 59 (2011), which reversed a judgment on a jury verdict in a temporary construction easement condemnation action and ordered a new trial on the basis that the condemnor's expert appraiser's methodology was not sufficiently reliable to be admissible. 216 N.C. App. at 266–67, 719 S.E.2d at 65–66. That decision, in turn, relied on the North Carolina Supreme Court's decision in *Haywood*, which affirmed a directed verdict in favor of the condemnor after holding that the condemnee's experts' opinions were unreliable. 360 N.C. at 352–53, 626 S.E.2d at 647. In *Haywood*, experts testified that certain percentages used in arriving at damages were based on "feelings and personal opinions," which the Supreme Court

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11. The Richardsons rightly point out that, when a motion *in limine* seeking to exclude certain evidence has been denied, the movant must object to the admission of that evidence at trial to preserve the matter for appeal. *State v. Patterson*, 194 N.C. App. 608, 616, 671 S.E.2d 357, 362 (2009), *overruled on separate grounds*, *State v. Campbell*, 368 N.C. 83, 772 S.E.2d 440 (2015). The Town did so here. The trial transcript discloses six instances in which Mr. Gruelle testified on direct to the \$190,000 value of the Easement; each one was followed by an objection from the Town's attorneys. While it is true that Mr. Gruelle discussed the number as part of lengthy answers that were uninterrupted by either party's counsel, the trial court acknowledged that the nature of the Richardsons' questioning and Mr. Gruelle's answers made it difficult for the Town to know when to object, and the Town did lodge objections at the conclusion of each answer from Mr. Gruelle. Finally, the Town's counsel stated on the record his intention to object to the opinions given by Mr. Gruelle. On the transcript before us, we hold that the Town preserved the issue for appellate review.

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concluded were “unsupported by objective criteria,” and amounted to “hunches and speculation.” *Id.* at 352, 626 S.E.2d at 647. As a result, our Supreme Court held that the experts’ opinions were not based on “any method used to arrive at [their] figures,” and therefore were not reliable. *Id.* at 352, 626 S.E.2d at 647. *Combs* reversed a judgment based on a jury verdict because the condemnor’s expert “based his valuation of the [easement] on his experience that such temporary takings do not affect the remainder of the condemnee’s property, rather than an actual assessment that the [condemnee’s] property outside of the [easement] was not affected[.]” 216 N.C. App. at 266–67, 719 S.E.2d at 65. We therefore held that the appraiser’s “method of proof lacked sufficient reliability.” *Id.* at 266–67, 719 S.E.2d at 65. As recounted *supra*, Mr. Gruelle arrived at his \$190,000 value for the Easement by calculating a dollar-per-square-foot value for the property, applying that value to the square footage of the Easement Area, and reducing that total amount by ten percent. Mr. Gruelle then opined that the Easement “represented 90 percent of the value of [the Easement Area].” When asked how he arrived at the 90 percent number, he stated that it was “based on the broad nature of those rights, [which] in [his] opinion . . . represented 90 percent of the value of the easement area.”<sup>12</sup> He then “check[ed] . . . if that 90 percent was reasonable” by evaluating the taking as a temporary construction easement or a ground lease.

Rather than attempting to compare the Easement to actual temporary construction easements and ground leases, and even after recognizing that “there are many indicators based on the value of the property” in calculating the value of such property rights, Mr. Gruelle assumed that the “typical” temporary construction easement and ground lease is valued at “a ten percent return to the land for the duration[.]” That formulation, applied to the ten-year duration of the Easement, resulted in a complete taking of 100 percent of the Easement Area’s value. After conceding that his calculation was equivalent to a total taking in fee of the Easement Area, Mr. Gruelle decided to depart from that result as he did not “think it would exceed the value of the fee[.]” and instead asserted that 90 percent was the correct value because “it would come close to

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12. Mr. Gruelle’s written report provides no indication of how he arrived at the 90 percent number; rather it simply states that “the property owners will lose control of approximately 24% of their whole property and 100% of their beach property. As such, the percentage of the rights acquired are concluded to represent 90% of the fee value of the easement area.”

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the fee value . . . because it was total . . . utilization of that property for 10 years.”<sup>13</sup>

Mr. Bourne, who was retained by the Richardsons in part to review and support Mr. Gruelle’s appraisal, testified at deposition that Mr. Gruelle’s assumption that the typical ground lease or temporary construction easement was valued at a ten-percent-per-year return was unfounded. Specifically, Mr. Bourne stated that: (1) ground leases and temporary construction easements are different; (2) “[t]hey all have different terms, so it’s difficult to generalize[;]” (3) he would not assume a return of ten percent per year, but instead “would look at some doc — yes, some information[;]” and (4) there was no “rule of thumb” that ground leases are valued at a ten-percent-per-year return.

As in *Haywood*, Mr. Gruelle did not articulate a method for reaching his opinion that the easement was valued at \$190,000. *Haywood*, 360 N.C. at 352, 626 S.E.2d at 647; *see also Combs*, 216 N.C. App. at 266–67, 719 S.E.2d at 65. Testimony based solely on a conclusory opinion does not present *any* method to which a trial judge can apply the three-part reliability test from *Daubert* under Rule 702, and admitting such evidence is an abuse of discretion. *Combs*, 216 N.C. App. at 266–67, 719 S.E.2d at 65–66.<sup>14</sup>

To the extent that Mr. Gruelle attempted to verify his 90 percent opinion by treating the Easement as a “typical” ground lease or temporary construction easement, his testimony “seemed to deny the sufficiency of his own . . . methodology[.]” *Kumho*, 526 U.S. at 155, 143 L.Ed.2d at 255, as he recognized that such a calculation would value the Easement at 100 percent of its fee value, not his preferred value of 90 percent. Rather than accept this illogic, he “made [an] adjustment” back down to his 90 percent number, but did not explain why an adjustment

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13. Mr. Gruelle’s deposition testimony largely comports with his testimony at trial, with the added details at deposition that: (1) he did not discuss the valuation of beach nourishment easements with appraisers and real estate agents local to the Nags Head area in preparing his written report; and (2) he could not further “br[eak] [the 90 percent number] out” to explain it, and instead explained that he just “looked at it as a ten percent return on the land, . . . like a temporary construction easement.”

14. We note that the trial court’s JNOV order implicitly acknowledges that Mr. Gruelle’s testimony was inadmissible as to the fair market value of the Easement, as it concluded “[t]he only competent expert testimony introduced at trial on the first preliminary question regarding market value of the temporary beach nourishment easement was the \$330.00 market value testified to by the Town’s expert witness Michael N. Moody, MAI.” *See Blair Invs., LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013) (“[C]ompetent evidence is generally defined as synonymous with admissible evidence[.]”) (citation omitted).

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by ten percent, and not some other percentage, was appropriate. Finally, Mr. Bourne demonstrated that Mr. Gruelle's method was unreliable, testifying at deposition that there is no "typical" ten percent return per year for ground leases or construction easements, that every such valuation was different, and that engaging in such a valuation would require a review of external data. Mr. Gruelle's unfounded assumption that the "typical" ground lease or temporary construction easement carried a ten percent return per year was simply "based on hunches and speculation . . . lack[ing] sufficient reliability." *Haywood*, 360 N.C. at 352, 626 S.E.2d at 647. Such "conjecture, speculation, or surmise is not allowed by the law to be a basis of proof in respect of damages or compensation" in condemnation cases, *Raleigh, C. & S. Ry. Co. v. Mecklenburg Mfg. Co.*, 169 N.C. 156, 160, 85 S.E. 390, 392 (1915).<sup>15</sup> Therefore, Mr. Gruelle's testimony fails the requirement of Rule 702 that "[t]he testimony [must be] the product of reliable principles and methods." N.C. R. Evid. 702(a)(2) (2015). The trial court abused its discretion in admitting this testimony, and remand for a new trial is appropriate. *Combs*, 216 N.C. App. at 267, 719 S.E.2d at 66 (remanding for new trial in light of improperly admitted expert testimony as to just compensation); see also *M. M. Fowler*, 361 N.C. at 15, 637 S.E.2d at 895 (remanding for new trial on damages in condemnation action where expert testimony was erroneously admitted).

### III. CONCLUSION

The Town is not entitled to JNOV on the ground that it already possessed the Easement Rights through the public trust doctrine, nor on the ground that the doctrine otherwise precludes all recovery, because these arguments were not raised until months after final judgment. Further, the Town is estopped from asserting that no condemnation occurred and that it already possessed these rights because: (1) it admitted it did not possess them in its complaint; (2) it did not raise the issue at the "all other issues" hearing under Section 40A-47; (3) it expressly disavowed reliance on the public trust doctrine at that hearing and at its hearing on its motions *in limine*; and (4) it did not raise the issue at trial, in its motions for directed verdict, or in its motion for JNOV. Further, the Richardsons introduced evidence sufficient to support the jury verdict. We therefore reverse the entry of JNOV. We nonetheless remand for a new trial on the Town's cross-appeal, as we hold that the trial court abused its discretion in admitting Mr. Gruelle's expert testimony. At the new trial the parties may introduce additional new evidence on the issue of damages in conformity with this opinion.

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15. This opinion was reprinted in 1955 at 169 N.C. 204.

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REVERSED AND REMANDED FOR NEW TRIAL.

Judge HUNTER concurs.

Judge DILLON concurs in part and dissents in part in a separate opinion.

DILLON, Judge, concurring in part and dissenting in part.

I concur in the portions of the majority opinion concerning the “public trust doctrine” contained in subsections A, B, and C of the “Discussion” section of that opinion. Indeed, the issue of whether the actions of the Town in engaging in the beach nourishment project in the public trust portion of the beach constituted a compensable taking of Defendants’ property rights is not before us. The Town admitted to the taking. Rather, the only issue concerns the calculation of damages.

For the reasons stated below, I dissent from the portion of the majority’s analysis contained in subsections D and E, concerning Defendants’ evidence on damages. My disagreement with the majority involves a very nuanced evidentiary issue. Indeed, I agree with much of the majority’s concern regarding the testimony offered by Defendants’ experts. But based on my disagreement, I must conclude that a new trial is not necessary in this case; the trial court correctly granted the Town’s judgment JNOV to the extent it set aside the jury’s verdict of \$60,000. Rather, the matter should be remanded to the trial court for the limited purpose of reducing the judgment to \$330 based on the only *relevant* evidence (which came from the Town’s expert) to support the value of the easement that the Town admitted to taking.

As noted by the majority, under the applicable statute, Defendants are entitled to the GREATER of (1) the diminution in the fair market value of *their entire lot* caused by the taking of the easement and (2) the fair market value of *the easement itself* that was taken. The jury determined that the diminution in value of Defendants’ lot due to the taking of the easement was \$0; that is, the jury determined that the value of Defendants’ entire lot was not affected by the taking at all. But the jury also determined that *the easement itself* had a value of \$60,000. Therefore, the jury returned a verdict of \$60,000.

Following the verdict, the trial court granted the Town’s JNOV motion, concluding that the only evidence concerning the value of the easement itself offered at trial was from the Town’s expert, who valued the easement for \$330. Indeed, experts for Defendants did make

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statements during their testimony suggesting that the value of the easement itself exceeded \$60,000. These statements made by Defendants' experts concerning the value of the easement itself is the subject of my disagreement with the majority.

The majority essentially holds that (1) Defendants' experts each gave an opinion of value concerning the easement itself, (2) the basis of these opinions, however, were not sufficiently reliable and, therefore, the trial court should not have allowed the opinions into evidence, (3) the portion of the verdict concerning the value of the easement itself was not otherwise supported by competent evidence. Based on this reasoning, the majority concludes that Defendants should get a new trial to have another opportunity to offer evidence concerning the value of the easement itself, essentially reasoning that since the trial court erroneously allowed Defendants' evidence, Defendants felt no need to offer *other* evidence concerning the value of the easement itself. That is, so the majority concludes, had the trial court ruled correctly and excluded the opinion of Defendants' expert concerning the value of the easement itself, Defendants may have then offered *other* evidence on the issue.

I disagree with the majority's understanding of the statements made by Defendants' experts concerning the value of the easement itself. I believe that while Defendants' experts did make such statements, they never intended these statements to amount to their expert opinion regarding the value of the easement itself. Rather, Defendants offered their testimonies for the *sole purpose* of giving their opinions of the "before" and "after" values of the entire lot; Defendants did not offer these experts for the purpose of offering evidence on the value of the easement itself, as Defendants were relying on their testimonies to show that their lot as a whole had suffered a large diminution in value. It is true that both appraisers in their testimonies did make statements concerning the value of the easement itself. However, in each case, the appraiser was simply making an *assumption* concerning the value of the easement itself to show how he derived the "after" value of the entire lot.<sup>1</sup>

To explain my point, consider that the *assumption* by Defendants' appraisers concerning the value of the easement itself is analogous to other *assumptions* made by appraisers in valuing property. For instance, in deriving the "before" value of Defendants' lot as a whole,

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1. For example, one of Defendants' experts testified that he arrived at a large diminution in value of the lot as a whole based on a calculation containing several components, one of which was his estimate of the value of the easement itself.

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one of Defendants' appraisers, Mr. Gruelle, relied upon the reported sales price of three comparable beach-front homes, a common practice by appraisers in valuing a home. Mr. Gruelle's analysis contains statements of value of these comparable homes (based on what they sold for), but these values do not represent his expert opinion regarding the value of those homes. Indeed, it is doubtful that he had first-hand knowledge of what those other homes sold for but rather relied upon hearsay (tax records or data from a multiple listing service). But the values provide data points that he relied upon to come up with his expert opinion of value of Defendants' lot itself. Though these data points would be inadmissible if they were offered to show the value of the comparable homes themselves, they are admissible under Rule 703<sup>2</sup> to show the data he relied upon to derive his opinion concerning the value of Defendants' lot.

In the same way, Mr. Gruelle's statement that he estimated the value of the easement portion of Defendants' lot to be \$190,000 was intended to be an educated assumption he used in deriving the "after" value of Defendants' lot as a whole. Mr. Gruelle did not intend for the \$190,000 estimate of the easement itself to be viewed as his expert opinion of the value of the easement itself; he certainly did not derive this valuation by comparing the easement itself to the sales of other beach strips.

The trial court did not err in allowing Defendants' experts to make statements concerning the value of the easement itself, since they were offered only for the purpose of explaining how they were deriving the "after" value of Defendants' lot as a whole. While such statements would have been inadmissible as evidence to support a conclusion of value of the easement itself, the statements were certainly admissible to show the basis of the opinions concerning the "after" value of the lot as a whole, under Rule 703.

In conclusion, the only *relevant* evidence offered concerning the value of the easement itself came from the Town's expert, who testified that its value was a mere \$330. Defendants did not offer any relevant evidence concerning the value of the easement itself, nor did they ever intend to offer relevant evidence, competent or incompetent, on the value of the easement itself. Their experts merely made statements concerning the value of the easement itself to explain their opinions

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2. Rule 703 states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence.*" N.C. Gen. Stat. § 8C-1, Rule 703 (emphasis added).

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of value of the lot as a whole. The record does not reveal how the jury came up with their \$60,000 valuation of the easement itself. There was no *relevant* evidence offered to support such a verdict. Therefore, the trial court properly set aside the verdict. However, I see no need for a new trial. Defendants were not prejudiced by the trial court's evidentiary ruling. Indeed the ruling was correct under Rule 703, and Defendants never intended to offer any evidence to prove the value of the easement anyway.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 JULY 2018)

BAUCOM v. VLAHOS No. 17-858	Mecklenburg (01CVD22905)	Reversed and Remanded
BRANTON v. BRANTON No. 17-1207	Alexander (14CVD418) (15CVD336)	Affirmed
BRYAN v. DAILEY No. 17-788	New Hanover (11CVD822)	Affirmed
FIFE v. ETERNAL WOODWORKS, LLC No. 17-645	N.C. Industrial Commission (15-744035)	Affirmed
GRODENSKY v. McLENDON No. 17-1258-2	Durham (15CVS4722)	Affirmed in part, reversed and remanded in part.
IN RE A.M. No. 17-1257	Onslow (15JA83)	Reversed
IN RE C.S. No. 18-160	Durham (15JT37-38)	Affirmed
IN RE E.A.V. No. 17-1235	Mecklenburg (14JT693)	Affirmed
IN RE FORECLOSURE OF WORSHAM No. 17-1268	Mecklenburg (16SP2777)	Reversed and Remanded
IN RE L.S. No. 18-48	Durham (17J89-90)	Affirmed
IN RE R.W. No. 18-172	Orange (17JA41)	Affirmed
IN RE Y.T. No. 18-58	Forsyth (17J137-139)	Affirmed
KENNIHAN v. KENNIHAN No. 17-1154	Chatham (14CVD762)	Dismissed
KRAUSE v. RK MOTORS, LLC No. 17-1168	Mecklenburg (15CVS8568)	Affirmed in part; Dismissed in part.

McGUIRE v. OLSON No. 18-44	Watauga (17CVD125)	Affirmed
McNAMARA v. McNAMARA No. 17-1411	Moore (13CVD754)	Reversed and Remanded
MOCH v. A.M. PAPPAS & ASSOCS., LLC No. 17-1126	Orange (15CVS1475)	Affirmed
STATE v. BEAM No. 17-1232	Mecklenburg (16CRS19043) (16CRS205180) (16CRS205181)	No Error in Part, Dismissed in Part
STATE v. DEGAND No. 17-1026	Wake (15CRS206409)	No Error; Remanded in Part
STATE v. FULLER No. 17-495	Davidson (15CRS54724) (16CRS165)	No Error
STATE v. GRADY No. 17-731	Brunswick (13CRS56129)	No Error
STATE v. JOHNSON No. 17-634	Duplin (15CRS51856)	No Plain Error
STATE v. McKNIGHT No. 17-1240	Brunswick (15CRS51051) (16CRS18)	Affirmed
STATE v. McRAVION No. 17-1177	Lincoln (16CRS53384)	New Trial
STATE v. PETERSON No. 17-1336	Beaufort (13CRS52488)	Affirmed
STATE v. POORE No. 17-1387	Wilkes (14CRS50680) (14CRS52851) (15CRS163) (15CRS188-89) (15CRS249) (15CRS43)	Vacated and Remanded
STATE v. PORTER No. 17-738	Pender (15CRS61) (15CRS838-839)	No Error

STATE v. REYNOLDS No. 17-1239	Polk (15CRS190)	No Error
STATE v. SMITH No. 17-1378	Pender (16CRS51012)	Dismissed
STATE v. TAYLOR No. 17-730	New Hanover (13CRS9336)	No Error
STEWART v. STEEL CREEK PROP. OWNERS ASS'N No. 17-1213	Transylvania (14CVS216)	Reversed and Remanded in Part; Affirmed in Part.





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